9697 No. 12965

United States
Court of Appeals
for the Ninth Circuit

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

vs

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Petitioner:

LOUIS JANIN, Esq.
HAROLD E. HAVEN, Esq.

For Respondent:

W. J. McFARLAND, Esq.
T. M. MATHER, Esq.

Docket No. 19283

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

Transferred to Judge Turner 7/27/49

1948

June 14—Petition received and filed. Taxpayer notified. Fee paid.

June 15—Copy of petition served on General Counsel.

July 27—Answer filed by General Counsel.

July 27—Request for hearing in San Francisco filed by General Counsel.

Aug. 5—Notice issued placing proceeding on San Francisco calendar. Service of answer and request is hereby made.

1949

Mar. 11—Hearing set May 9, 1949, San Francisco.

May 13—Hearing had before Judge Van Fossan on merits. Stipulation of Facts with exhibits 2B attached, filed. Briefs, June 27, 1949. Replies July 18, 1949.

June 3—Transcript of Hearing 5/13/49 filed.

1949

June 27—Brief filed by taxpayer. Copy served by attorney.

June 27—Brief filed by General Counsel.

July 18—Reply Brief filed by taxpayer. Copy served by counsel.

1950

July 31—Opinion rendered J. Turner. Decision will be entered under Rule 50.

Aug. 15—Motion for correction and enlargement of findings of fact filed by petitioner.

Aug. 15—Motion to vacate findings of fact and opinion of 7/31/50 and reconsider it's determination filed by petitioner.

Aug. 15—Motion for hearing on said motions in San Francisco, Calif., or elsewhere filed by petitioner.

Aug. 22—Respondent's computation filed.

Sept. 6—Hearing set Sept. 20, 1950, Washington, D. C., under Rule 50.

Sept. 18—Motion for continuance of hearing on Rule 50 until motions of petitioner heretofore filed have been acted upon filed by petitioner.

Sept. 20—Hearing had before Judge Arundell on settlement—Referred to Judge Turner.

Oct. 17—Hearing set November 1, 1950, San Francisco, on petitioner's motion. Copy served.

1950

Nov. 1—Hearing had before Judge Turner on petitioner's motion for reconsideration. Motion for correction and enlargements of Findings of Fact denied. Motion for reconsideration denied.

Nov. 20—Transcript of Hearing November 1, 1950 filed.

Dec. 8—Order that motions be and are denied, entered.

1951

Jan. 29—Hearing set Feb. 14, 1951, Washington, D. C., under Rule 50.

Feb. 2—Consent to settlement, filed by taxpayer.

Feb. 7—Decision entered, Turner J. Div. 8.

May 4—Petition for Review by U. S. Court of Appeals for the Ninth Circuit with assignments of Error filed by taxpayer.

May 4—Designation of record filed by taxpayer.

May 9—Proof of service of petition for review filed.

May 9—Proof of Service of Designation of record filed.

[Title of Tax Court and Cause.]

PETITION

The above named taxpayer hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols - IT:FC:GSS-150D) dated February 2, 1948; and as a basis of his proceeding alleges as follows:

1. The petitioner is a corporation organized and existing under the laws of the Territory of Hawaii; and having its principal office at Room 22, Campbell Block, in Honolulu, T. H. (P.O. Box 3113). The returns for the periods here involved, prepared on the accrual basis, were filed with the Collector of Internal Revenue for the District of Hawaii, at Honolulu, T. H.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to petitioner on February 2, 1948.

3. The taxes in controversy are excess profits taxes for the fiscal years ended November 30, 1943, and November 30, 1944, in the respective amounts of $21,424.70 and $7,403.23. The excess profits tax deficiency of $2,703.76 asserted for the year ended November 30, 1942, is not directly in controversy, but its redetermination may prove necessary to a disposition of this proceeding.

4. The determination of tax set forth in the said

notice of deficiency is based upon the following errors:

(a) The Commissioner erred in failing and refusing to compute petitioner's excess-profits credit under the applicable provisions of "Supplement A" (Sections 740-742, I.R.C.), and without explanation in computing such credit on the invested capital basis, petitioner's returns having always been prepared and filed on the earnings basis.

(b) The Commissioner erred in failing and refusing to determine that petitioner's excess profits credit on the basis of the earnings of its predecessor partnership as required under the provisions of Sections 740 and 742 of the Internal Revenue Code as amended, such credit being $25,279.04, and substantially greater than the credit computed under the invested capital basis.

(c) The Commissioner erred in failing to determine and compute the excess profits credit carryovers and carrybacks applicable to the years in issue from the years ended November 30th in 1941, 1942, 1944 and 1945 predicated on the credit for such years determined on the basis of the earnings of petitioner's predecessor partnership.

(d) The Commissioner erred in failing to determine either (1) that petitioner had elected to adopt the retroactive application of the amendments of Section 228 of the Revenue Act of 1942 or (2) that strict compliance with his regulation issued thereunder had been waived by him, or (3) that said regulation, Sec. 30.742-2(e) as added by T. D. 5242, is and was unconstitutional, illegal and void as herein

sought to be applied by the Commissioner, being beyond the authorization of Congress, being unfair and prejudicial by reason of the delay in its promulgation, and its requirements being without reason or meaning as applied to this petitioner.

5. The facts upon which petitioner relies as a basis for its proceeding are as follows:

(a) Petitioner was organized March 13, 1940 under the laws of the Territory of Hawaii, the business and substantially all of the assets of a partnership being transferred to it in exchange for its stock on April 1, 1940, in an exchange within the ambit of section 112(b)(5) I.R.C.

(b) This partnership had existed since January 1, 1937, with the only changes in its organization being minor ones made immediately prior to the aforesaid exchange and as a step in its consummation.

(c) All excess profits tax returns filed by the petitioner have claimed the benefits of Supplement A, and have computed an excess profits credit largely determined by the base period earnings of its predecessor partnerships.

(d) As late as June 6, 1944, in the audit of said returns, the Commissioner's representatives treated petitioner as entitled to the benefits of Supplement A, and he is now estopped to contend that petitioner did not make an effective election to be so treated for its excess profits tax years ended in 1940, 1941 and 1942 under the provisions of Section 228 of the Revenue Act of 1942 and Sec. 30.742-2(e), Regulations 109, as added by T. D. 5242, March 11, 1943.

(e) Petitioner's excess profits net income for its years ended November 30 up through 1945 was as follows:

1940......	$ 1,718.07	1943......	$32,119.36
1941......	$ 6,866.08	1944......	$22,460.03
1942......	$12,453.77	1945......	$ 8,060.45

(f) Petitioner's excess profits credit, computed on the income method without the benefit of carry-backs and carryforwards, as applicable to said taxable years is not less than as follows:

1940......	$21,694.14	1943......	$25,279.04
1941......	$21,694.14	1944......	$25,279.04
1942......	$25,279.04	1945......	$25,279.04

(g) Petitioner's predecessor had base period net income as determined by the Tax Court in its memorandum findings of fact and opinion dated May 29, 1947, and as follows:

	Calendar Years			3 months
	1937	1938	1939	1940
Net Income	$49,887.19	$35,062.57	$29,706.50	$27,658.54
Partner's "Salaries"	8,015.00	9,300.00	11,000.00	....
Balance	$41,872.19	$25,762.57	$18,706.50	$27,658.54
Dividends included	15.92	35.77	40.90	14.23

(h) Petitioner is informed and believes and therefore alleges the fact to be that it is entitled to the use of an excess profits credit for all of its excess profits tax years computed under the provisions of "Supplement A" and particularly, that it made an effective election to have the amendments of the Revenue Act of 1942 apply retroactively.

(i) Petitioner is informed and believes and therefore alleges the fact to be that it is entitled to an excess profits credit carry forward to its year ended in 1943 of not less than $14,828.06 from its year ended in 1941 and not less than $12,825.27 from its year ended in 1942.

(j) Petitioner is informed and believes and therefore alleges the fact to be that it is entitled to an excess profits credit carryback from its year ended in 1945 of not less than $17,218.59 and from its year ended in 1944 of not less than $2,819.01.

Wherefore, petitioner prays the Court to hear the proceeding, to determine that petitioner has no deficiency in excess profits taxes, grant such other relief as proper.

Respectfully submitted,

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
Counsel for Petitioner.

State of California,
City and County of San Francisco—ss.

Ben Fitch being first duly sworn, deposes and says:

That he is the president of Hawaiian Freight Forwarders, Ltd., a corporation, petitioner above named, and as such is authorized to make and makes this verification on behalf of said petitioner; that he has read the foregoing petition, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be

upon information and belief, and that those he believes to be true.

/s/ BEN FITCH

Subscribed and sworn to before me this 8th day of June, 1948.

[Seal] /s/ ALFRED I. MARTIN,
Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "A"

Form 1233 SN-IT-4

Treasury Department
Internal Revenue Service
P.O. Box 421, Honolulu 9, Hawaii

Office of Internal Revenue Agent in Charge
Honolulu Division, 500 Alexander Young Bldg.

In replying refer to IT:FC:GSS-150D Feb. 2, 1948

Sirs:

You are advised that the determination of your income tax liability for the taxable years ended November 30, 1942, November 30, 1943 and November 30, 1944 discloses an overassessment of $11,454.34, and that the determination of your declared value excess profits tax liability for the taxable year ended November 30, 1943 discloses a deficiency of $20.63, and that the determination of your excess profits tax liability for the taxable years ended November 30, 1942, November 30, 1943 and November 30, 1944 dis-

Exhibit "A"—(Continued)

closes a deficiency of $31,531.69, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 150 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 150th day) from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C. for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form of waiver and acceptance and forward it to the Internal Revenue Agent in Charge, P.O. Box 421, Honolulu, 9, T. H., for the attention of IT:FC:GSS. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GEO. J. SCHOENEMAN,
Commissioner
By H. A. PETERSON,
Internal Revenue Agent in Charge.

Enclosures: Statement, Form of waiver and acceptance, Forms 843(3), Form 1276.

Exhibit "A"—(Continued)

STATEMENT

IT:FC:GSS

Hawaiian Freight Forwarders, Limited
P.O. Box 3113, Honolulu, T. H.

Tax Liability for the Taxable Years Ended November 30, 1942, November 30, 1943, and November 30, 1944

Year	Liability	Assessed Income Tax	Overassessment	Deficiency
11-30-42	$ 2,305.74	$ 3,050.60	$ 744.86	
11-30-43	2,144.97	10,451.69	8,306.72	
11-30-44	3,610.81	6,013.57	2,402.76	
Totals	$ 8,061.52	$19,515.86	$11,454.34	

Declared Value Excess Profits Tax

Year	Liability	Assessed	Overassessment	Deficiency
11-30-43	$ 1,557.90	$ 1,537.36		$ 20.63

Excess Profits Tax

Year	Liability	Assessed	Overassessment	Deficiency
11-30-42	$ 2,703.76	None		$ 2,703.76
11-30-43	21,424.70	None		21,424.70
11-30-44	7,403.23	None		7,403.23
Totals	$31,531.69	None		$31,531.69

In making this determination of your income tax, declared value excess profits tax and excess profits tax liability, careful consideration has been given to the original and supplemental reports of examination dated February 7, 1945, and November 6, 1945, respectively, covering the taxable year ended November 30, 1942, to the report of examination dated April 11, 1946 covering the taxable year ended November 30, 1943 and to the report of examination dated January 9, 1948 covering the taxable year ended November 30, 1944.

The overassessment in income tax shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 322(a) of the Internal Revenue Code, provided that you fully protect yourself against the running of the statute of limita-

Exhibit "A"—(Continued)

tions with respect to the apparent overassessment referred to in this letter, by filing with the collector of internal revenue for your district, claims for refund on Forms 843, three copies of which are enclosed, the basis of which may be set forth herein.

Taxable Year Ended November 30, 1943

Adjustments to Net Income

Net income as disclosed by return	$12,687.29
Unallowable deductions and additional income:	
(a) Capital stock tax	81.25
Net income adjusted	$12,768.54

Explanation of Adjustments

(a) Accrual of capital stock tax corrected to amount paid for capital stock tax year ended June 30, 1943.

Computation of Tax

Net income adjusted		$12,768.54
Less: 10% of $400,000.00 as declared in your capital stock tax return for year ended June 30, 1942	$40,000.00	
85% of dividends received, $1.25	1.06	40,001.06
Net income subject to declared value excess profits tax		None

Computation for normal tax and surtax for taxable years ended on or after June 30, 1942:

Computation under 1941 Law—Tentative Tax

Net income for declared value excess profits tax		$12,768.54
Less: Declared value excess profits tax		....
Net income for capital stock tax purposes		$12,768.54
Less: Excess profits tax under 1941 law	$1,630.04	
Dividends received credit	1.06	1,631.10
Balance subject to normal tax and surtax		$11,137.44

Exhibit "A"—(Continued)

Computation under 1941 Law—Tentative Tax—(Continued)

Normal tax at 15% on $5,000.00		750.00
Normal tax at 17% on $6,137.44		1,043.36
Total normal tax		$ 1,793.36
Surtax at 6% on $11,137.44		668.25
Total tentative normal tax and surtax at 1941 rates		$ 2,461.61

Computation under 1942 Law—Tentative Tax

Net income above		$12,768.54
Less: Income subject to excess profits tax	$4,657.27	
Dividends received credit	1.06	4,658.33
Balance subject to normal tax and surtax		$ 8,110.21
Normal tax at 15% on $5,000.00		750.00
Normal tax at 17% on $3,110.21		528.74
Total normal tax		$ 1,278.74
Surtax at 10% on $8,110.21		811.02
Total tentative normal tax and surtax at 1942 rates		$ 2,089.76

Conversion of Tentative Tax to Actual Tax

Total tentative tax computed at 1941 rates	$2,461.61	
Number of days prior to July 1, 1942 212		
Prorated tax 212/365 of $2,461.61		$ 1,429.76
Total tentative tax computed at 1942 rates	$2,089.76	
Number of days after June 30, 1942 in taxable year 153		
Prorated tax—153/365 of $2,089.76		875.98
Total income tax liability for taxable year ended November 30, 1942		$ 2,305.74
Income tax disclosed by return— Account No. Jan. 410007	3,030.54	
Additional assessed on March 16, 1945	20.06	3,050.60
Overassessment in income tax		$ 744.86
Excess profits net income as disclosed by return		$12,372.52

Exhibit "A"—(Continued)

Conversion of Tentative Tax to Actual Tax—(Continued)

Unallowable deductions and additional income:	
(a) Capital stock tax	81.25
Excess profits net income adjusted	$12,453.77

Explanation of Adjustments

(a) Accrual of capital stock tax corrected to amount paid for capital stock tax year ended June 30, 1943.

Computation of Excess Profits Credit on Invested Capital Method

Money and property paid in for capital stock		$30,000.00
Accumulated earnings at November 30, 1941 per books		4,239.90
Organization expense charged off		350.00
Capital stock tax overaccrued		458.00
Deficiency in income tax for November 30, 1941		(75.57)
Equity invested capital		$34,972.33
Reduction on account of inadmissible assets:		
Total inadmissible assets per supplemental report dated November 6, 1945	$39.75	
Percentage of inadmissible assets to total assets per supplemental report dated November 6, 1945—.045869		
Reduction on account of inadmissible assets .045869 x $34,972.33		16.04
Invested capital		$34,956.29
Excess profits credit—8% of $34,956.29		$ 2,796.50

Excess Profits Tax Computation for Taxable Years Beginning in 1941 and Ending After June 30, 1942

Excess profits net income adjusted		$12,453.77
Less: Specific exemption	$5,000.00	
Excess profits credit	2,796.50	7,796.50
Adjusted excess profits net income		$ 4,657.27

Exhibit "A"—(Continued)

Excess Profits Tax Computation for Taxable Years Beginning in 1941 and Ending After June 30, 1942—(Continued)

Excess profits tax computed under Section 710(a)(3)(A):	
Excess profits tax on $4,657.27 at 35%—Tentative Tax....	1,630.04
Excess profits tax computed under Section 710(a)(3)(B):	
Excess profits tax on $4,657.27 at 90%—Tentative tax....	4,191.54
Total excess profits tax:	
Portion of tentative tax computed under section 710(a)(3)(A) applicable to number of days before July 1, 1942—212/365 x $1,630.04	$ 946.76
Portion of tentative tax computed under section 710(a)(3)(B) applicable to number of days after June 30, 1942—153/365 x $4,191.54	1,757.00
Excess profits tax liability	$ 2,703.76
Excess profits tax disclosed by return, Account No. Jan. 800003	....
Deficiency in excess profits tax	$ 2,703.76

Taxable Year Ended November 30, 1943

Adjustments to Net Income

Net Income as disclosed by return	$33,524.85
Unallowable deductions and additional income:	
(a) Capital stock tax	156.25
Net income adjusted	$33,681.10

Explanation of Adjustments

(a) Accrual of capital stock tax corrected to amount paid for capital stock tax year ended June 30, 1944.

Computation of Tax

Net income adjusted		$33,681.10
Less: 10% of $175,000 as declared in your capital stock tax return for year ended June 30, 1943	$17,500.00	
85% of dividends received, $3.75	3.18	17,503.18
Net income subject to declared value excess profits tax		$16,177.92

Exhibit "A"—(Continued)

Computation of Tax—(Continued)

5% of declared value of capital stock—$175,000.00—		
$8,750.00 at 6.6%		$ 577.50
Balance $7,427.92 at 13.2%		980.49
Total declared value excess profits tax		$ 1,557.99
Declared value excess profits tax disclosed by return—		
Account No. Feb. 410000		1,537.36
Deficiency in declared value excess profits tax		$ 20.63
Net income for declared value excess profits tax		$33,681.10
Less: Declared value excess profits tax		1,557.99
Adjusted net income		$32,123.11
Less: Income subject to excess profits tax	$23,805.22	
Dividends received credit	3.18	23,808.40
Normal tax and surtax net income		$ 8,314.71
Normal tax at 15% on $5,000.00		$ 750.00
Normal tax at 17% on $3,314.71		563.50
Total normal tax		$ 1,313.50
Surtax at 10% on $8,314.71		831.47
Total income tax liability		$ 2,144.97
Income tax liability disclosed by return		
Account No. Feb. 410000		10,451.69
Overassessment in income tax		$ 8,306.72
Excess profits net income as disclosed by return		$31,983.74
Unallowable deductions and additional income:		
(a) Capital stock tax		156.25
Total		$32,139.99

Exhibit "A"—(Continued)

Computation of Tax—(Continued)

Nontaxable income and additional deductions:	
(b) Deficiency in declared value excess profits tax	20.63
Excess profits net income adjusted	$32,119.36

Explanation of Adjustments

(a) Accrual of capital stock tax corrected to amount paid for capital stock tax year ended June 30, 1944.

(b) Deficiency in declared value excess profits tax for the taxable year ended November 30, 1943, per this report.

Computation of Excess Profits Credit on Invested Capital Method

Money and property paid in for capital stock		$30,000.00
Accumulated earnings at November 30, 1942 per books		13,071.16
Organization expense charged off		350.00
Capital stock tax overaccrued		81.25
Deficiency in income tax for November 30, 1941		(75.57)
Deficiency in income tax for November 30, 1942		(20.06)
Overassessment in income tax for November 30, 1942		744.86
Deficiency in excess profits tax for November 30, 1942		(2,703.76)
Equity invested capital		$41,447.88
Reduction on account of inadmissible assets:		
Total inadmissible assets per report dated April 11, 1946	$39.75	
Percentage of inadmissible assets to total assets per report dated April 11, 1946—.051		
Reduction on account of inadmissible assets—.051 x $41,447.88		21.14
Invested capital		$41,426.74
Excess profits credit—8% of $41,426.74		$ 3,314.14

Computation of Excess Profits Tax

Excess profits net income adjusted		$32,119.36
Less: Specific exemption	$5,000.00	
Excess profits credit	3,314.14	8,314.14

Exhibit "A"—(Continued)

Computation of Excess Profits Tax—(Continued)

Adjusted excess profits net income	$23,805.22
90% of $23,805.22	$21,424.70
Surtax net income	$32,119.36
80% of $32,119.36	$25,695.49
Income tax	2,144.97
Excess	$23,550.52
Excess profits tax liability	$21,424.70
Excess profits tax disclosed by return— Acct. No. Jan.NC 800002	....
Deficiency in excess profits tax	$21,424.70

Taxable Year Ended November 30, 1944

Adjustments to Net Income

Net income as disclosed by return	$22,463.78
Net income adjusted—no changes	$22,463.78

Computation of Tax

Net income adjusted		$22,463.78
Less: 10% of $250,000.00 as declared in your capital stock tax return for year ended June 30, 1944	$25,000.00	
85% of dividends received, $3.75	3.18	25,003.18
Net income subject to declared value excess profits tax		None

Exhibit "A"—(Continued)

Computation for normal tax and surtax for taxable years beginning in 1943 and ending in 1944:

Computation under 1943 Law—Tentative Tax

Net income for declared value excess profits tax		$22,463.78
Less: Declared value excess profits tax		....
Net income		$22,463.78
Less: Adjusted excess profits tax income	$13,293.34	
Dividends received credit	3.18	13,296.52
Normal tax net income and surtax net income		$ 9,167.26
Normal tax at 15% on $5,000.00		$ 750.00
Normal tax at 17% on $4,167.26		708.43
Total normal tax		$ 1,458.43
Surtax at 10% on $9,167.26		916.73
Total tentative normal tax and surtax at 1943 rates		$ 2,375.16

Computation under 1944 Law—Tentative Tax

Net income above		$22,463.78
Less: Adjusted excess profits net income	$8,293.34	
Dividends received credit	3.18	8,296.52
Normal tax net income and surtax net income		$14,167.26
Normal tax at 15% on $5,000.00		$ 750.00
Normal tax at 17% on $9,167.26		1,558.43
Total normal tax		$ 2,308.43
Surtax at 10% on $14,167.26		1,416.73
Total tentative normal tax and surtax at 1944 rates		$ 3,725.16

Conversion of Tentative Tax to Actual Tax

Total tentative tax computed at 1943 rates	$2,375.16	
Number of days in 1943—31		
Prorated tax—31/366 of $2,375.16		$ 201.17

Exhibit "A"—(Continued)

Computation of Tax—(Continued)

Total tentative tax computed at 1944 rates	3,725.16	
Number of days in 1944—335		
Prorated tax—335/366 of $3,725.16		$ 3,409.64
Total income tax liability for taxable year ended November 30, 1944		$ 3,610.81
Income tax liability disclosed by return Acct. No. Feb. 410007		6,013.57
Overassessment in income tax		$ 2,402.76
Excess profits net income as disclosed by return		$22,460.03
Excess profits net income adjusted—no change		$22,460.03

Computation of Excess Profits Credit on Invested Capital Method

Money and property paid in for capital stock		$30,000.00
Accumulated earnings at Nov. 30, 1943, per books		34,550.81
Organization expense charged off		350.00
Capital stock tax overaccrued		156.25
Deficiency in income tax for Nov. 30, 1941		(75.57)
Deficiency in income tax for Nov. 30, 1942		(20.06)
Overassessment in income tax for Nov. 30, 1942		744.86
Deficiency in excess profits tax for Nov. 30, 1942		(2,703.76)
Deficiency in declared value excess profits tax for Nov. 30, 1943		(20.63)
Overassessment in income tax for Nov. 30, 1943		8,306.72
Deficiency in excess profits tax for Nov. 30, 1943		(21,424.70)
Post war refund of excess profits tax		2,318.17
Equity invested capital		$52,182.09
Reduction on account of inadmissible assets:		
Total inadmissible assets per report dated Jan. 9, 1948	$187.55	
Percentage of inadmissible assets to total assets per report dated Jan. 9, 1948—.1887		
Reduction on account of inadmissible assets .1887 x $52,182.09		98.47

Exhibit "A"—(Continued)
Computation of Excess Profits Credit on Invested Capital Methods—(Continued)

Invested capital	$52,083.62
Excess profits credit—8% of $52,083.62	$ 4,166.69

Excess Profits Tax Computation for Taxable Years Beginning in 1943 and Ending in 1944

Computation at 1943 rates:		
Excess profits net income adjusted		$22,460.03
Less: Specific exemption	$5,000.00	
Excess profits credit	4,166.69	9,166.69
Adjusted excess profits net income		$13,293.34
Excess profits tax computed under Section 710(a)(6)(A):		
Excess profits tax on $13,293.34 at 90%—Tentative tax		$11,964.01
Computation at 1944 rates:		
Excess profits net income adjusted		$22,460.03
Less: Specific exemption	$10,000.00	
Excess profits credit	4,166.69	14,166.69
Adjusted excess profits net income		$ 8,293.34
Excess profits tax computed under Section 710(a)(6)(B):		
Excess profits tax on $8,293.34 at 95%—Tentative tax		$ 7,878.67
Total excess profits tax:		
Portion of tentative tax computed under section 710(a)(6)(A) applicable to number of days in 1943—31/366 x $11,964.01		$ 1,013.35
Portion of tentative tax computed under section 710(a)(6)(B) applicable to number of days in 1944—335/366 x $7,878.67		7,211.35
Total excess profits tax		$ 8,224.70

Exhibit "A"—(Continued)

Excess Profits Tax Computation for Taxable Years Beginning in 1943 and Ending in 1944—(Continued)

Surtax net income	$22,460.60
80% of $22,460.00	$17,968.48
Income tax	3,610.81
Excess	$14,357.67
Total excess profits tax	$ 8,224.70
Less: 10% credit	822.47
Excess profits tax liability	$ 7,403.23
Excess profits tax disclosed by return—Acct. No. Feb. 940000	....
Deficiency in excess profits tax	$ 7,403.23

Received and Filed T.C.U.S. June 14, 1948.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the tax in controversy is excess profits tax for the taxable years ended November 30, 1943 and November 30, 1944; denies the remain-

ing allegations contained in paragraph 3 of the petition.

4. (a), (b), (c), (d). Denies that the determination of tax set forth in the notice of deficiency is based upon error as alleged in subparagraphs (a), (b), (c) and (d) of paragraph 4 of the petition.

5. (a). Denies the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b), (c). For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs (b) and (c) of paragraph 5 of the petition.

(d) to (j), inclusive. Denies the allegations contained in subparagraphs (d) to (j), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT, WTF,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

T. M. MATHER,

W. J. McFARLAND,
Special Attorneys,
Bureau of Internal Revenue.

Received and Filed T.C.U.S. July 27, 1948.

[Title of Tax Court and Cause.]

REQUEST FOR DESIGNATION OF PLACE OF HEARING

Now comes the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and in accordance with Rule 26 of the Court's Rules of Practice.

Request that the Court designate that the hearing in the above-entitled proceeding be held at San Francisco, California, or vicinity, in order to afford the respective parties an opportunity to produce evidence at the trial with a minimum expense.

/s/ CHARLES OLIPHANT, WTF,
Chief Counsel, Bureau of
Internal Revenue

Of Counsel:
B. H. NEBLETT,
T. M. MATHER,
W. J. McFARLAND,
Special Attorneys,
Bureau of Internal Revenue

Received and Filed T.C.U.S. July 27, 1948.

[Title of Tax Court and Cause.]

NOTICE OF PLACE OF HEARING

Notice is hereby given that the above entitled proceeding has been placed upon the San Francisco, Calif., calendar of the Court for hearing on the

merits in due course either in the city named or in the vicinity thereof.

This notice refers only to the place of hearing and not to the time. The parties will be notified in due course of the exact time and place of hearing on the merits.

If either party desires that the hearing on the merits be held at some place other than the place above named, he must so notify the Court within 30 days from the date of this notice, and name the place he prefers. The Court will consider any request filed as above provided, and if it decides that the place of hearing should be changed, it will so notify the parties.

Service of answer and request is hereby made.

Dated: August 5, 1948.

/s/ VICTOR S. MERSCH,
Clerk.

To: Louis Janin, Esq., 1104 Mills Tower, San Francisco 4, Calif.

[Title of Tax Court and Cause.]

NOTICE OF SETTING PROCEEDING FOR HEARING—CIRCUIT CALENDER

Take Notice that a Division of The Tax Court of the United States will sit in Custom House Courtroom No. 421, Appraisers Bldg., San Francisco, Calif., beginning May 9, 1949.

Hearings will be held in all proceedings shown on

the attached list. The list will be called promptly at 10:00 a.m., as indicated, and you will be expected to answer the call at that time and be prepared for trial when reached. No continuance will be granted except for extraordinary cause. Failure to appear will be taken for cause for dismissal in accordance with the Rules of Practice, and you are in all other respects expected to be familiar with such rules.

Dated: March 11, 1949.

Respectfully,

/s/ VICTOR S. MERSCH,
Clerk.

To: Louis Janin, Esq., 1104 Mills Tower, San Francisco 4, Calif.

[Title of Tax Court and Cause.]

APPLICATION FOR SUBPOENA
Duces Tecum

To the Tax Court of the United States:

Application is hereby made for the issuance of a subpoena for the attendance before a Division of The Tax Court of the United States, Customs Courtroom, Room 421, U. S. Appraisers Bldg., 630 Sansome Street, at San Francisco, California, on May 9, 1949, at 10:00 o'clock a.m. or any further hearing of the above-named proceeding, of the following persons whose oral testimony is desired on behalf of the respondent in the above-entitled proceeding:

Name: Hawaiian Freight Forwarders, Ltd., by Ben Fitch, President, or any duly authorized officer or employee who is able to identify the documents called for below.

Address: 420 Market Street, San Francisco, California.

The above party is required to bring the following:

(1) All balance sheets and profit and loss statements per books of Hawaiian Freight Association, Ltd., for the year 1936; (2) All balance sheets, profit and loss statements and capital and withdrawal accounts per books of the partnership known as Hawaiian Freight Association for the years 1937 to 1940, inclusive; (3) All balance sheets and profit and loss statements per books of Hawaiian Freight Forwarders, Ltd., for the years 1940 to 1942, inclusive.

The issues involved in this cause are of such a nature as to make it essential to have available at the trial of this proceeding, the records listed above, in order to properly present the respondent's position.

Dated: March 24, 1949.

/s/ CHARLES OLIPHANT, GM,
Chief Counsel,
Bureau of Internal Revenue

Filed T.C.U.S. March 29, 1949.

[Title of Tax Court and Cause.]

SUBPOENA—DUCES TECUM

The President of the United States of America to Hawaiian Freight Forwarders, Ltd., 420 Market Street, San Francisco, Calif., by Ben Fitch, President, or any duly authorized officer or employee who is able to identify the documents called for below, Greeting:

You Are Hereby Commanded under penalty of law to be and appear in your proper person before a Division of The Tax Court of the United States, Customs Courtroom, Room 421, U. S. Appraisers Building, 630 Sansome Street, at San Francisco, California, on the 9th day of May, 1949, at 10:00 o'clock a.m., or any further hearing of the above-named proceeding, then and there to testify on behalf of the respondent in the matter of the tax liability of the above-named petitioner, now pending before The Tax Court of the United States.

You are required to bring with you the following, to wit: (1) All balance sheets and profit and loss statements per books of Hawaiian Freight Association, Ltd., for the year 1936;

(2) All balance sheets, profit and loss statements and capital and withdrawal accounts per books of the partnership known as Hawaiian Freight Association for the years 1937 to 1940, inclusive;

(3) All balance sheets and profit and loss state-

ments per books of Hawaiian Freight Forwarders, Ltd., for the years 1940 to 1942, inclusive.

By order of the Court this day of March 29, 1949.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Delivered 3/29/49.

The Tax Court of the United States

MINUTES OF PROCEEDINGS

Date: May 13, 1949. Place: San Francisco, Calif. Docket No. 19283.

Proceeding: Hawaiian Freight Forwarders, Ltd.

Assigned to: Judge Van Fossan, Division No. 9.

Counsel: For Petitioner: Louis Janin, Esq., 1104 Mills Tower, San Francisco, Calif; For Respondent: W. J. McFarland, Esq.

Stenographic Reporter: Cotton.

Hearing: 2:45 p.m., 3:10 p.m. Sub.

Transcript Ordered: Yes.

On the merits: Yes.

Filed at hearing: Stipulation of Facts with Exhibits 2-B attached.

Petitioner's brief: 45 days—June 27, 1949. Respondent's brief: 45 days—June 27, 1949. Replies 20 days—July 18, 1949.

Exhibits: Petitioner's: 3. Certified copy of Statement of Co-Partnership; 4. Certified copy of Statement of Dissolution; 5. Certificate of Treasurer, Hawaii; 6. Report of Tennant & Greaney; 7. Report dated 6/2/44; 8. Report dated 2/19/45.

Exhibits: Respondent's: C. 1936 Partnership Tax

Return; D. Final Partnership Ret. of Income for 1940; E. Partnership Return of Income 1940; F. 1940 Tax Return (Form 1120); G. 1940 Tax Return (Form 1121); H. 1941 Tax Return (Form 1120); I. 1941 Tax Return (Form 1121) J. 1942 Tax Return (Form 1120); K. 1942 Tax Return (Form 1121); L. 1943 Tax Return (Form 1120); M. 1943 Tax Return (Form 1121); N. 1944 Tax Return (Form 1120); O. 1944 Tax Return (Form 1121); P. 1945 Tax Return (Form 1120); Q. 1945 Tax Return (Form 1121).

/s/ MARY Y. ROBERTS,
Acting Deputy Clerk.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Agreed by the parties to the above entitled proceeding, acting through their respective counsel, that the statements hereinafter set forth are true, reserving to each of said parties and their respective counsel the right to introduce other evidence not inconsistent with such statements:

1. Hawaiian Freight Association, Ltd., was organized as a corporation under the laws of the Territory of Hawaii on March 16, 1933, to engage in the freight forwarding business; it was liquidated and dissolved on or about December 31, 1936 and its assets distributed to its then shareholders who were

J. C. Leffel, owning	33 shares
G. C. Ballentyne, owning	24 shares
A. G. Schnack, owning	10 shares

2. On or about January 2, 1937, the said shareholders of Hawaiian Freight Association, Ltd., created a partnership, Hawaiian Freight Association, and to it transferred the assets and business theretofore owned and operated by Hawaiian Freight Association, Ltd. The interests of the partners were in the same proportions as their shareholdings in the predecessor corporation and so remained until March 8, 1940.

3. Prior to March 8, 1940, an understanding had been reached between J. C. Leffel and G. C. Ballentyne and Oahu Railway and Land Company that a corporation would be formed to take over and operate the assets and business of Hawaiian Freight Association, with Leffel, Ballentyne and Oahu as equal shareholders. It was believed that this would be to the mutual advantage of the parties concerned.

4. On March 8, 1940, an agreement was entered into by and between Schnack, Leffel and Ballentyne with respect to Schnack's interest in Hawaiian Freight Association, a true copy of which agreement marked Exhibit A-1 is attached hereto and by this reference made a part hereof. The payment of the $8,000 referred to therein was by check of the partnership drawn March 8, 1940. After the withdrawal of A. G. Schnack, Ballentyne and Leffel were equal partners in the business conducted by Hawaiian Freight Association.

5. The petitioner corporation was organized under the laws of the Territory of Hawaii on March 13 or 14, 1940, with a capital of $120,000 represented by 6,000 shares, issued 2,999 to Leffel and 2,998 to

Ballentyne, 3 qualifying shares being nominally issued to others. For these shares the petitioner received the business and the following assets formerly owned by Hawaiian Freight Association:

Cash	$19,237.07
Receivables	9,151.08
Furniture and Fixtures	1,341.86
Stationery and Supplies	269.99
Goodwill	90,000.00
	$120,000.00

The change of operations to corporate form was fully effected by April 1, 1940. The great bulk of the business was between Chicago and Honolulu, and the time required from the initiation of business to delivery and collection of charges was normally three weeks. The transfer of the assets listed above was completed on April 1, 1940. Attached hereto and marked Exhibit B-2 is a true and correct copy of the minutes of the adjourned meeting of the shareholders of petitioner held on March 19, 1940.

6. The first excess profits tax return filed for the petitioner was that for its fiscal year ended November 30, 1941, filed on or about February 15, 1942. Its excess profits tax return for the fiscal year ended November 30, 1940, was filed June 15, 1942. The excess profits tax returns for the fiscal years subsequent to that ended November 30, 1941, to and including that for the year ended November 30, 1945, were filed on or about the due date thereof. All of such returns claimed a credit on the average earnings method, utilizing as one of the factors the earnings of Hawaiian Freight Association.

7. The following schedule reflects net income before Federal taxes upon which petitioner's excess profits credit may be computed under Rule 50 in the event it is determined by the Court that petitioner is entitled to the provisions of Supplement A as provided by Sections 740 to 744, inclusive, of the Internal Revenue Code:

Year Ended	12/31/37	$28,648.27
	12/31/38	18,185.82
	12/31/39	14,352.05
Three months ended	3/31/40	18,089.59

8. The excess profits net income of the petitioner for its taxable years 1940 to 1945, inclusive, is as follows:

Year	Net Income
1940	$ 1,718.07
1941	6,866.08
1942	12,453.77
1943	32,119.36
1944	22,460.03
1945	8,060.45

9. The capital and accumulated earnings as shown by the books of the partnership known as Hawaiian Freight Association were as follows:

	1937	1938	1939	3 months 1940
Capital at beginning of year	$16,984.12	$16,984.12	$16,984.12	$16,984.12
Accumulated earnings, Jan. 1	....	19,208.21	14,138.70	16,943.74
Totals, Jan. 1	$16,984.12	$36,192.36	$31,122.82	$33,927.86

10. The individual accounts of the partners as shown by said books and the audit reports of Ten-

nant and Greaney, C.P.A.s, for the calendar years 1937 to 1939, inclusive, were as follows:

	J. C. Leffel	G. C. Ballentyne	A. G. Schnack
Capital, %	49.26	35.82	14.92
Capital, Jan. 1, 1937	$ 8,366.42	$ 6,083.67	$ 2,534.03
Salary	4,200.00	3,815.00	....
Profit	20,547.83	14,941.60	6,223.58
Totals	$33,114.25	$24,840.27	$ 8,757.61
Drawings	15,247.29	11,926.48	3,346.03
Balance Dec. 31, 1937	$17,866.96	$12,913.79	$ 5,411.58
1937 profits drawn 1938	9,500.54	6,830.12	2,877.55
Capital, Jan. 1, 1938	$ 8,366.42	$ 6,083.67	$ 2,534.03
Salary	4,650.00	4,650.00	....
Profit	12,588.77	9,132.26	3,803.83
Totals	$25,575.19	$19,865.93	$ 6,337.86
Drawings	10,657.99	8,998.60	1,000.00
Balance Dec. 31, 1938	$14,917.20	$10,867.33	$ 5,337.86
1938 profits drawn 1939	6,550.78	4,783.66	2,803.83
Capital, Jan. 1, 1939	$ 8,366.42	$ 6,083.67	$ 2,534.03
Salaries	5,500.00	5,500.00	....
Profit	9,121.37	6,632.71	2,762.71
Totals	$22,987.79	$18,216.38	$ 5,296.74
Drawings	5,742.98	6,830.07	....
Balance Dec. 31, 1939	$17,244.81	$11,386.31	$ 5,296.74

11. The net income of the partnership, Hawaiian Freight Association, for the period January 1, 1940-March 31, 1940, was in the amount of $27,662.94, its final return for 1940 disclosing a net income of $27,-658.54 which includes a long term net capital loss of $4.40 sustained April 5, 1940.

12. Approximately $30,000.00 of capital was required by the petitioner for its operations.

13. That portion of the foregoing stipulation which deals with the earnings of the Hawaiian Freight Association for the three months ended March 31, 1940, shall not be regarded as a concession on the part of the respondent that only one partnership was in existence during the said period, it being the respondent's position that the elimination of A. G. Schnack as a partner on March 8, 1940 terminated the existing partnership and resulted in the creation of a new partnership on that date. It is agreed that if the respondent's position in this respect is sustained, the earnings for said three-months' period can be prorated on a daily basis.

Witness our hands this 2nd day of May, 1939.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
Counsel for Petitioner.

/s/ CHARLES OLIPHANT, GM,
Chief Counsel,
Bureau of Internal Revenue
Counsel for Respondent

EXHIBIT A-1

This Agreement, made and entered into this 8th day of March, 1940, by and between A. G. Schnack, of Honolulu, City and County of Honolulu, Territory of Hawaii, hereinafter called the Party of the First Part, and J. C. Leffel, of Chicago, Illinois, and

Exhibit A-1—(Continued)

G. C. Ballentyne, of Honolulu aforesaid, hereinafter called the Parties of the Second Part,

Witnesseth That

Whereas, the Party of the First Part and the Parties of the Second Part are co-partners doing business under the firm name and style of Hawaiian Freight Association," and

Whereas, said Party of the First Part is desirous of withdrawing from said co-partnership and withdrawing from said co-partnership his entire share or interest in all of the property and assets of said co-partnership, and

Whereas for the period ending December 31, 1939, as shown by the audit of said co-partnership made by Tennent & Greaney, certified public accountants, the interest of said co-partnership amounts to the sum of Five Thousand Two Hundred Ninety-Six and 74/100ths Dollars ($5,296.74), and

Whereas additional profits have been earned by said co-partnership for the period from December 31, 1939, to the date hereof, said profit together with the interest of said Party of the First Part in the good will and other assets of said co-partnership amounting to the agreed sum and value of Two Thousand Seven Hundred Three and 06/100ths Dollars ($2,703.06), the total interest of said Party of the First Part to date totalling Eight Thousand Dollars ($8,000.00),

Now, Therefore, in consideration of the distribu-

Exhibit A-1—(Continued)

tion by said co-partnership to said Party of the First Part of the sum of Eight Thousand Dollars ($8,000), receipt whereof is hereby acknowledged by said Party of the First Part, the Party of the First Part, as of the date hereof, withdraws from said co-partnership and releases unto said Parties of the Second Part, as the remaining partners in said co-partnership, all of his, said Party of the First Part's interest in and to the remaining property and assets, tangible and intangible, of said co-partnership, including all investments, corporate stocks, prepaid freight, debts, claims, book accounts, choses in action, whether the same are now due and payable or hereafter become due and payable, all rights, privileges and powers of every kind, and in and unto the good will of said co-partnership;

And in consideration of the foregoing, said Parties of the Second Part assume and agree to pay all obligations of said co-partnership and to indemnify and save harmless said Party of the First Part from any loss, damage or liability by reason of his having been a member of said co-partnership.

In Witness Whereof the parties hereto have executed these presents the day and year first above written.

/s/ A. G. SCHNACK,
Party of the First Part

/s/ J. C. LEFFEL,

/s/ G. C. BALLENTYNE,
Parties of the Second Part.

Exhibit A-1—(Continued)

Territory of Hawaii,
City and County of Honolulu—ss.

On this 8th day of March, 1940, before me personally appeared A. G. Schnack, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[Seal] JOHN EPPINGER,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 8th day of March, 1940, before me personally appeared J. C. Leffel and G. C. Ballentyne, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[Seal] JOHN EPPINGER,
Notary Public, First Judicial Circuit, Territory of Hawaii.

EXHIBIT B-2

Minutes of Adjourned Meeting of the Stockholders of Hawaiian Freight Forwarders, Ltd.

The adjourned meeting of the stockholders of Hawaiian Freight Forwarders, Ltd, was held at the

Exhibit B-2—(Continued)

office of Smith, Wild, Beebe & Cades, Bishop Trust Building, Honolulu, Territory of Hawaii, on Tuesday, March 19, 1940, at 10 o'clock a.m., all incorporators and stockholders being present.

Capital Stock

Upon motion duly seconded, the officers of the corporation were authorized to issue to J. C. Leffel two thousand nine hundred ninety-nine (2,999) shares of capital stock of Hawaiian Freight Forwarders, Ltd., and to G. C. Ballentyne two thousand nine hundred ninety-eight (2,998) shares of the capital stock of said corporation, in consideration of the transfer by said J. C. Leffel and said G. C. Ballentyne of all of the property and assets of said Hawaiian Freight Association, a co-partnership, including the sum of $30,000.00 cash, said J. C. Leffel and G. C. Ballentyne being the sole co-partners of said co-partnership, said transfer to be in the form as set forth in the affidavit of officers filed with the Treasurer of the Territory of Hawaii on March 14, 1940.

Election of Officers and Directors

Upon motion duly seconded, the persons named in the Articles of Association were elected officers and directors of the corporation as stated in the Articles of Association, to serve until the annual stockholders' meeting of the corporation in 1941, and thereafter until their successors are elected.

Corporate Seal

Upon motion duly seconded, Mr. G. C. Ballentyne authorized the Secretary to prepare a corporate seal

Exhibit B-2—(Continued)

in the form prescribed by the By-Laws which was duly adopted as the seal of the corporation.

Appointment of Auditor

Upon motion duly made and seconded, Tennant & Greaney certified public accountants, Dillingham Building, Honolulu, T. H., were appointed auditors of the corporation.

There being no further business to come before the meeting, the meeting was adjourned.

RICHARD W. WHITE,
Secretary.

Approved:

G. C. BALLENTYNE,
President

Filed T.C.U.S. May 13, 1949.

[Title of Tax Court and Cause.]

Miss Peters, Mrs. Roberts, Docket Clerk, Mr. Cypert:

The following entitled proceedings are hereby reassigned from Judge Van Fossan (Division 9), to Judge Turner (Division 8).

Proceeding	Docket No.
Harold W. & Corinne E. Johnston	19928
The Prosperity Co., Inc.	17446
Est. of Geo. F. Thompson, Dec'd.	20114
Hawaiian Freight Forwarders, Ltd.	19283

Please change all records accordingly.

Dated: July 27, 1949.

/s/ JOHN W. KERN,
Presiding Judge.

[Title of Tax Court and Cause.]

15 T. C. No. 7

FINDING OF FACT AND OPINION
Promulgated July 31, 1950

A, B and C were partners in a freight forwarding business with interests approximating 49%, 35% and 15%, respectively. A and B reached an agreement with an outside party for the transfer of the business and its assets, exclusive of C's interest, to a newly organized corporation. An agreement was then reached with C for the payment to him of an amount which the parties had agreed represented his interest in the assets of the business, including good will and in the accumulated profits since the beginning of the year. Petitioner corporation was then formed and in exchange for its entire issue of 6,000 shares of stock acquired the business of the partnership including good will and up to $30,000 of the other assets remaining after the above payment to C. The 6,000 shares of stock were received 2,999 by A, 2,998 by B and 3 by their nominees. Held, that petitioner was not an acquiring corporation of the said partnership within the meaning of section 740(a)(1)(D) of the Internal Revenue Code since

the exchange by A and B of their interests in the partnership for petitioner's stock was not an exchange to which section 112(b)(5) of the Internal Revenue Code was applicable.

Louis Janin, Esq., for the petitioner.
W. J. McFarland, Esq., for the respondent.

OPINION

Turner, Judge: The respondent determined deficiencies in excess profits tax against the petitioner for the fiscal years ended November 30, 1943, and November 30, 1944, in the amounts of $21,424.70 and $7,403.23. The question is whether or not the respondent erred in determining petitioner's excess profits credit on the basis of invested capital under section 714 of the Internal Revenue Code rather than upon the basis of income under section 713 of the Code. The answer to that question in turn depends upon the determination whether petitioner was or was not an acquiring corporation under the provisions of section 740(a)(1)(D) of the Code.

The facts have been stipulated and as stipulated are so found.

The petitioner is a corporation organized under the laws of the Territory of Hawaii on March 13 or 14, 1940. It filed its returns for the taxable years here in question with the Collector of Internal Revenue for the Territory of Hawaii.

It is the claim of petitioner that it acquired, in the

manner prescribed in section 740(a)(1)(D),[1] substantially all of the properties of Hawaiian Freight Association, a partnership. The partnership had previously succeeded to the business and assets of Hawaiian Freight Association, Ltd., an Hawaiian corporation which had been organized on March 6, 1933, to engage in the freight forwarding business. The corporation was liquidated and dissolved on or about December 31, 1936, at which time its 67 shares of outstanding stock were owned 33 by Leffel, 24 by Ballentyne and 10 by Schnack. Upon liquidation its business and assets were distributed to its shareholders who on January 2, 1937, two days later, organized the partnership, Hawaiian Freight Association, to which they transferred the freight forwarding business. Their partnership interests were in the same proportions as the corporate stock had been owned. This partnership operation continued through 1937, 1938, 1939, and into 1940.

At some time prior to March 8, 1940, an arrangement and understanding was reached whereby the business of Hawaiian Freight Association, the partnership, would be acquired by a new corporation to

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[1] Sec. 740. Definitions.

(a) Acquiring Corporation.—The term "acquiring corporation" means—

(1) A corporation which has acquired—

* * * *

(D) substantially all the properties of a partnership in an exchange to which section 112(b)(5), or so much of section 112(c) or (e) as refers to section 112(b)(5), or to which a corresponding provision of a prior revenue law, is or was applicable.

be formed with Leffel, Ballentyne and Oahu Railway and Land Company as equal shareholders. Schnack was not included in the plans for the new corporation.

In steps taken to effectuate the above understanding an agreement was entered into on March 8, 1950, between Schnack on the one hand and Leffel and Ballentyne on the other, whereby it was agreed that Schnack would receive from the partnership, as his interest therein, the sum of $8,000, and that he would release unto Leffel and Ballentyne any and all interest he might have in and to the remaining property and assets, tangible and intangible, including good will. Leffel and Ballentyne agreed to indemnify Schnack and save him harmless from any loss, damage or liability by reason of his having been a member of the partnership. The agreement disclosed that on the basis of an audit of the partnership's affairs for the period ending December 31, 1939, Schnack's interest in the assets and business was shown as $5,296.74 and further that his share of profits for the period from December 31, 1939, to March 8, was $2,703.06. It was agreed that $8,000, the total in round figures of the two amounts stated, represented Schnack's interest in the good will and other assets of the partnership plus his share of the earnings after December 31, 1939.[2]

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[2] The parties have stipulated that according to the books and as disclosed by the audit report of a firm of certified public accountants, the balances in the accounts of the partners as of December 31, 1939 were: Leffel $17,244.81, Ballentyne $11,386.31 and

The capital of the petitioner when organized was fixed at $120,000 divided into 6,000 shares. After the above payment to Schnack, the petitioner in exchange for its 6,000 shares of stock received the going business of Hawaiian Freight Association and most, if not all, of its remaining assets. The assets so acquired are listed in the stipulation as follows:

Cash	$ 19,237.07
Receivables	9,151.08
Furniture and Fixtures	1,341.86
Stationery and Supplies	269.99
Good Will	90,000.00[3]
	$120,000.00

The stock issued in exchange for the said properties was issued 2,999 shares to Leffel, 2998 to Ballentyne and 3 to others as their nominees.

The issuance of petitioner's six thousand shares

Schnack $5,296.74. A breakdown of these amounts between the original contributions of partnership's capital and the balance of undrawn profits would show the following:

Leffel: Capital, $8,366.42—49.26%; Undrawn Profits, $8,878.39.

Ballentyne: Capital, $6,083.67—35.82%; Undrawn Profits, $5,302.64.

Schnack: Capital $2,534.03 — 14.92%; Undrawn Profits, $2762.71.

The stipulation also shows that the net income of the partnership for the period from January 1, 1940 to March 31, 1940 was $27,662.94.

[3] The stipulation gives no explanation of the wide margin of difference between the allowance therefor to Schnack under the March 8 agreement and the $90,000 at which it was carried into petitioner's books.

of stock for the above assets of Hawaiian Freight Association was approved at an adjourned meeting of petitioner's stockholders held on March 19, 1940. It was not possible to make immediate transfer of all of the partnership assets which were to be received by petitioner for the reason that the great bulk of the freight forwarding business was between Honolulu and Chicago and it required approximately three weeks to complete all operations on all of the business which had already been initiated. All transfers had been made by April 1, 1940, and the change of operations to petitioner was fully effected by that date.

On July 2, 1940, a statement of dissolution of the Hawaiian Freight Association, dated June 26, 1940, was filed in the office of the Treasurer of the Territory of Hawaii. The statement of dissolution showed Leffel, Ballentyne and Schnack as the partners and recited that the partnership was dissolved on March 14, 1940. The said statement was executed by A. G. Schnack and G. C. Ballentyne.

Under section 740(a)(1)(D) a corporation is to be regarded as an acquiring corporation and as such is entitled to utilize the base period earnings of its predecessor in computing its excess profit credit if it has acquired "substantially all of the properties of a partnership in an exchange to which section 112(b)(5) * * * is or was applicable." By the applicable provisions of section 112(b)(5) it is provided:

> No gain or loss shall be recognized if property is transferred to a corporation by one or more

> persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange. * * *

The parties have devoted much of their briefs to arguments whether the withdrawal of Schnack effected a termination or dissolution of the partnership Hawaiian Freight Association or whether as in this case, there being no provision in the partnership agreement specifically providing that the withdrawal of a partner should not terminate the partnership, the partnership did continue by operation of Hawaiian law with Leffel and Ballentyne as the partners during the period from March 8, the date of the agreement covering the withdrawal of Schnack, to April 30 when the transfer of the business to petitioner was finally and fully completed.

It is not necessary in our opinion to take up and discuss the arguments so made since here the facts and the applicable provisions of the statute never permit us to reach a point where such arguments might be material. Regardless of whether the partnership agreement did or did not contain a provision for continuation of the partnership upon the withdrawal of one of the parties and regardless of whether under the laws of Hawaii a partnership may be said to continue upon the withdrawal of a partner where

as here, there is no prior agreement for continuation, the facts present render these considerations immaterial. Here there was no intention on the part of anyone that the partnership should continue. The agreement in substance was that subject to Schnack's withdrawal the petitioner would be organized to take over the business and most, if not all, of the remaining assets of the partnership, Hawaiian Freight Association. Just when Schnack took down his share is not known but within five or six days of the agreement fixing the terms of his withdrawal petitioner was formed and the stipulated facts definitely show that the necessary steps to move to petitioner the business and that part of the assets it did acquire began immediately, even though the three weeks required to complete all business which had already been initiated and was then in process did not permit completion of the transfer until April 1, three weeks and one day after the effective date of Schnack's withdrawal. While the record is not specific on the point, presumably all business initiated after March 8 and completed after April 1, was regarded as the business of the petitioner although as hereafter shown in applying the statute it is really of little moment whether that was or not strictly the case. In any event any and all operations in the interval were transitional and were handled as they were merely as an expedient and an incident to the acquisition by petitioner of the partnership business and that part of the partnership assets agreed upon. We have no occasion, therefore, to concern ourselves with the law of Hawaii as to the continuation of a partner-

ship after the withdrawal of a partner since for the purposes here we have no such case. Cf. Ransohoffs, Inc., 9 T. C. 376.

Our question accordingly is whether or not petitioner did acquire within the meaning of section 740(a)(1)(D) substantially all of the properties of Hawaiian Freight Association, the partnership which was organized on January 2, 1937, and which continued to the time when the agreements and understandings were reached under which the withdrawal of Schnack and his interests therein and the acquisition by petitioner of the partnership business and most, if not all, of the remaining assets were effected. If the transaction in question is to meet the requirements of the statute, it is necessary—first, that pursuant to the provisions of section 740(a)(1)(D) petitioner did acquire substantialy all of the properties of that partnership and, second, that the acquisition was in an exchange to which section 112(b)(5) of the Code was applicable. To be within section 112(b)(5) the exchange must have been solely for stock or securities of petitioner, the acquiring corporation, and after the exchange the persons making the exchange must have been in control of petitioner and not only that but the stock received by each such person must have been substantially in the same proportion as his interest in the property prior to the exchange.

According to the stipulation the petitioner received for its stock the freight forwarding business, including good will, and up to $30,000 of other partnership assets. Good will was listed at $90,000 while the

other assets, including cash, receivables, furniture and fixtures, and stationery and supplies were listed at $30,000.[4] There is nothing showing that good will was ever carried on the books of the partnership in any amount. Beyond the figures at which the above items were transferred to petitioner we have no information as to the properties of the partnership or their value except such information as may be reflected by the individual accounts of the partners and by the Schnack agreement of March 8. We do know that Schnack withdrew as his share and interest in the partnership, $8,000 net, which amount covered his original contribution to partnership capital and his pro rata part of the undrawn profits up to March 8. We know also that on January 1, 1940, Leffel's account showed a balance of $17,244.81 and Ballentyne's account a balance of $11,386.31, which amounts covered their original contributions to partnership capital and their shares of the undrawn profits at December 31, 1939. It is stipulated that the net income of the partnership for the period from January 1, 1940, to March 31, 1940, was $27,662.94. Except for Schnack's withdrawal of $8,000 as representing his interest in good will and other partnership assets plus his pro rata share of the 1940 profits to March 8, the record is silent as to withdrawals by any of the three partners. Inasmuch, however, as petitioner received only $30,000 of the

[4] As to the $30,000, the parties stipulated as follows:

Approximately $30,000.00 of capital was required by the petitioner for its operations.

partnership assets, exclusive of good will, it would appear that withdrawals were made by Leffel and Ballentyne in unknown amounts and proportions. There is no contention, however, that such withdrawals as were made were not in keeping with the pro rata interests of the two individuals in the partnership as they originally existed, due effect being given to the withdrawal by Schnack of his interest.

From the above we think it clear that it may not be said that petitioner acquired substantially all of the assets of the Hawaiian Freight Association in exchange for its stock and accordingly it does not meet the test of section 740(a)(1)(D), supra. E. T. Renfro Drug Co., 11 T. C. 994. Furthermore, due to the variance between the interests of Leffel and Ballentyne in the partnership it may not be said that the receipt by them on a 50-50 basis of the shares of the petitioner in exchange for the partnership assets represented a receipt by each of them of the said shares "substantially in proportion to his interest in the property prior to the exchange" so as to make the exchange an exchange to which section 112(b)(5) was applicable. See E. T. Renfro Drug Co., supra.

The record is silent as to whether or not Oahu Railway and Land Company became an equal shareholder with Leffel and Ballentyne. Due to the fact that corporate returns subsequently filed by petitioner listed the interests of Leffel and Ballentyne as being 33⅓% each it may be presumed that Oahu did subsequently become the owner of ⅓ of the shares of petitioner. Regardless, however, of whether it did or did not, the determination in this case must turn

and does turn, as previously stated, on the exchange between Ballentyne and Leffel on the one hand and the petitioner on the other, and if Oahu did become a stockholder at a later time presumably it did so by acquiring from the two individuals portions of their shares.

Since the issue to be decided has been decided for the reasons set out above, it becomes unnecessary to consider various alternative issues or to determine whether or not the petitioner properly filed an election necessary to make the Amendment by the Revenue Act of 1942 to Supplement A of the Excess Profits Tax Title of the Internal Revenue Code applicable to its case.

It not being clear whether decision of the issue presented by the parties and decided herein for the respondent is basis for entry of decision for the respondent without computation by the parties.

Decision will be entered under Rule 50.

[Seal]

The Tax Court of the United States

MINUTES OF PROCEEDINGS

Date: Sept. 20, 1950. Place: Washington, D. C. Docket No. 19283.

Proceeding: Hawaiian Freight Forwarders, Ltd.

Assigned to: Judge Arundell.

Counsel: For Petitioner: None. For Respondent: Robert C. Whitley, Esq.

Stenographic Reporter: Johnson. Hearing:.....
[cc] Transcript Ordered: No.

On motion of Settlement.

Ordered: Referred to Judge Turner.

RALPH A. STARNES,
Deputy Clerk.

[Title of Tax Court and Cause.]

NOTICE OF FILING AND HEARING MOTION

Please Take Notice the Petitioner has filed a motion in the above-entitled proceeding, a copy of which is enclosed herewith.

This motion has been placed on the Calendar for hearing Nov. 1, 1950 before a Division of the Court at Custom House Court, Room 421, Appraisers Bldg., 630 Sansome Street, San Francisco, California.

No further notice of this hearing will be sent.

Dated: October 17, 1950.

/s/ VICTOR S. MERSCH,
Clerk.

To: Louis Janin, Esq.

1104 Mills Tower, San Francisco, Calif.

The Tax Court of the United States

MINUTES OF PROCEEDINGS

Date: Nov. 1, 1950. Place: San Francisco, Calif. Docket No. 19283.

Proceeding: Hawaiian Freight Forwarders.

Assigned to: Judge Bolon B. Turner, Division No. 8.

Counsel: For Petitioner, Louis Janin, Esq., Harold E. Haven, Esq. For Respondent, T. M. Mather, Esq.

Stenographic Reporter: Johnson. Hearing: 2:30p-3:50p. Transcript Ordered: Yes.

On the merits: Yes.

On motion of petitioner for reconsideration.

Motion for correction and enlargements of findings of fact.—Denied.

Motion for Reconsideration.—Denied.

CLIFTON H. JACK,
Deputy Clerk.

The Tax Court of the United States
Washington

Docket No. 19283

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Findings of Fact and Opinion promulgated July 31, 1950, the respondent on August 22, 1950, having filed a proposed recomputation of the tax involved in accordance therewith, and the petitioner on February 2, 1951, having filed an acquiescence in such recomputation, it is

Ordered and Decided: That there is a deficiency in excess profits tax for the fiscal year ended November 30, 1943, in the amount of $21,424.70; and that there is a deficiency in excess profits tax for the fiscal year ended November 30, 1944, in the amount of $7,403.23.

Entered: February 7, 1951.

/s/ BOLON B. TURNER,
Judge.

Served: February 8, 1951.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Hawaiian Freight Forwarders, Ltd., the petitioner in this cause, by Louis Janin and Harold E. Haven, its counsel, hereby files its petition for a Review by the United States Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States rendered on February 7, 1951 (15 T.C. ......, No. 7) determining deficiencies in petitioner's excess profits taxes for its fiscal years ended November 30, 1943 and November 30, 1944, in the respective amounts of $21,424.70 and $7,403.23, and respectfully shows:

I.

The petitioner, Hawaiian Freight Forwarders, Ltd., is a corporation duly organized and existing under and by virtue of the laws of the Territory of Hawaii with its principal office in Honolulu, Territory of Hawaii.

This petition is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code, as amended. The returns for the taxes in controversy were filed with the Collector of Internal Revenue in Honolulu, T. H., which city is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

II.

Nature of the Controversy

The controversy involves the petitioner's liability

for excess profits taxes for its fiscal years ended in 1943 and 1944. The respondent determined and the Tax Court found that petitioner was liable for such taxes in the amounts of $21,424.70 and $7,403.23 for the respective years involved.

The basic question presented to the Tax Court was whether petitioner was entitled to the benefits of "Supplement A" (Sections 740-744) of the Internal Revenue Code. The provisions of Supplement A were added to the Code as a relief or remedial measure to permit corporations to utilize the base period earnings experience of certain predecessor corporations, partnerships and sole proprietorships.

The petitioner was organized on March 13 or 14, 1940 to succeed to the business and most of the assets of a partnership. Having no base period experience of its own, and having a small invested capital, its credit for excess profits tax purposes is nominal unless it may use the earnings experience of the predecessor business. The difference in credit involved amounts to approximately $17,500 for the year ended in 1943 and $16,700 for the year ended in 1944, exclusive of unused excess profits credit adjustments.

The predecessor business had been in existence since January 1, 1937, as a partnership. One of the partners was completely inactive in the business. He withdrew, with the consent of the others, on March 8, 1940, five or six days before the petitioner was organized, being paid $8,000 by partnership check for his capital interest and undrawn profits. This money was not needed in the business.

From March 8, 1940, the interests of the two remaining partners were equal, each owning a one-half interest in the partnership, its assets and its profits. They continued to operate the business during the brief period required for the formation of the petitioner corporation and the transfer of the partnership properties to it.

The transfer was fully effected by March 31, 1940, each of the partners receiving 50 per cent of petitioner's stock. The Commissioner at all times has treated the exchange as tax-free.

The principal question presented under these facts was whether the withdrawal of the inactive partner, owning only a 14.8% capital interest, acquiesced in by the active partners who continued the business, deprives petitioner of the relief it sought. The respondent originally had allowed such relief but in his determination herein utilized the credit on an invested capital basis without any explanation whatsoever, but apparently on the ground that the withdrawal of the inactive partner resulted in the immediate termination of the partnership and in the creation of a new partnership. Petitioner contended that this did not result under Hawaiian law, and also questioned the applicability and legality of the respondent's regulation.

Question was raised as to whether substantially all of the assets (more properly "properties") of the partnership were transferred to the corporation. The government contended that two partnerships were involved and that the assets transferred were

not substantially all of the properties of the partnership which was in existence prior to March 8, 1940, thereby merely presenting a different face on the primary issue rather than a different issue.

A subsidiary issue was whether petitioner was entitled to the benefits of Supplement A for its prior years in determining its unused excess profits tax credit. In order to obtain this benefit, petitioner was required to elect the same. Petitioner and the representatives of the Bureau had mistakenly believed it was entitled to the credit under prior law, and the return filed and agent's reports were prepared and submitted on that basis. Petitioner has always claimed on the Supplement A basis and contended before the Tax Court (a), that a valid election was made, and (b) that the Commissioner was estopped to assert otherwise.

III.

Specifications of Error

Petitioner specifies as error the following acts and omissions of the Tax Court of the United States:

1. The Court erred in assigning the controversy for determination to a Division of the Court other than that to whom the controversy was presented, such action being without authority of law and contrary to the statutory provisions establishing the Court and providing for the manner of exercise of its functions.

2. The Court erred in having a Division other than that to whom the controversy was presented de-

termine the same by findings of fact and opinion, and decision pursuant thereto, such acts being without authority of law, contrary to the statutory provisions establishing the Court and providing for the manner of exercise of its functions.

3. The Court erred in failing and refusing to make written findings of fact as required by law.

4. The Tax Court erred in finding:

> "Just when Schnack took down his share is not known * * *,"

the stipulation stating (Par. 4):

> "The payment of the $8,000 referred to therein was by check of the partnership drawn March 8, 1940."

5. The Court erred in finding:

> "Furthermore, due to the variance between the interests of Leffel and Ballentyne in the partnership it may not be said that the receipt by them on a 50-50 basis of the shares of the petitioner in exchange for the partnership assets, represented a receipt by each of them 'substantially in proportion to his interest in the property prior to the exchange' so as to make the exchange an exchange to which section 112(b)(5) was applicable,"

and in failing and refusing to find, as stated in the stipulation (Par. 4):

> "After the withdrawal of A. G. Schnack, Ballentyne and Leffel were equal partners in the business conducted by Hawaiian Freight Association."

6. The Court erred in finding (p. 9):

> "Except for Schnack's withdrawal of $8,000 —the record is silent as to withdrawals by any of the three partners.",

the stipulation (Par. 10) showing an annual record of the capital earnings and withdrawals of each partner and particularly showing that the balance of the profits of each year was withdrawn in the next year.

7. The Court erred in finding that the understanding between Leffel, Ballentyne and Oahu Railway and Land Company amounted to an "arrangement" or an "agreement", it being no more than a general understanding without legal force.

8. The Court erred in determining that "Schnack was not included in the plans for the new corporation", his non-participation being purely voluntary on his part.

9. The Court erred in finding:

> "Here there was no intention on the part of anyone that the partnership should continue,"

such finding being without evidentiary support and the stipulated facts clearly establishing that it did continue with Ballentyne and Leffel as equal partners from March 8, 1940 and until April 1, 1940, while petitioner was being organized and the transfers to it were being made.

10. The Court erred in failing and refusing to find that under the facts as stipulated and proved, and under the law of the Territory of Hawaii, the

partnership, Hawaiian Freight Association was not terminated by Schnack's voluntary withdrawal, but continued for at least the brief period necessary to wind up its affairs, at least until April 1, 1940.

11. The Court erred in determining that the question of whether one partnership was terminated and a new partnership created by the withdrawal of Schnack could be answered without reference to the law of Hawaii, and in refusing to consider such law as applicable to the issue.

12. The Court erred in finding that petitioner did not acquire substantially all of the assets of Hawaiian Freight Association, and in failing and refusing to find that petitioner acquired substantially all of the properties of said predecessor partnership.

13. The Court erred in determining that the exchange by two equal partners remaining after the withdrawals of Dr. Schnack for petitioner's stock in equal amounts was not a tax-free exchange within the ambit of Section 112(b)(5).

14. The Court erred in failing and refusing to follow the doctrine of judicial notice with respect to the proceedings involving the same parties and reported as a memorandum opinion May 29, 1947 (6 T.C.M. 601), said proceedings having been called to the Court's attention, and the doctrine being applicable to establish:

(a) The time when and manner by which Oahu Railway and Land Company became a shareholder.

(b) Additional evidence of the fact that petitioner did acquire substantially all the properties utilized in the business conducted by the predecessor partnership.

(c) Confirmation that the acquisition by petitioner of such properties was within the ambit of Section 112(b)(5) as determined by the Commissioner and that no issue under Section 112(b)(5) was presented for the Court's determination.

15. The Court erred in failing and refusing to find and determine that the petitioner was entitled to the benefits of the optionally retroactive amendments to Supplement A provided by the Revenue Act of 1942.

16. The Court erred in failing and refusing to find and determine that the petitioner had made a valid election to have Supplement A as amended by the Revenue Act of 1942 applied retroactively.

17. The Court erred in failing and refusing to find and determine that the Commissioner was estopped to assert that a valid election for the retroactive application of Supplement A had not been made.

18. The Court erred in failing and refusing to find and determine that under the facts as stipulated and the evidence presented, the petitioner had made a prima facie case as to each and every issue involved in the proceeding, and that no contrary or contradictory evidence existed to refute such prima facie case.

19. If the Court did not err in determining that the Partnership, Hawaiian Freight Association, was terminated by reason of Schnack's withdrawal, then the Court erred in failing and refusing to find and determine that the withdrawal of Schnack, the equalization of the interests of Leffel and Ballentyne, the organization of petitioner and the transfer of the partnership assets and business to petitioner were all parts of one transaction qualifying petitioner under Supplement A.

20. If the Court did not err in determining that the said partnership Hawaiian Freight Association was terminated on March 8, 1940, it erred in not determining that the respondent's regulation to the effect that a partnership cannot be an acquiring corporation was illegal and void as applied in this matter.

21. The Court erred in denying petitioner's motion for correction and enlargement of the Findings of Fact and Opinion, such denial being an abuse of discretion.

22. The Court erred in denying petitioner's motion for reconsideration, such denial being an abuse of discretion.

23. The Court erred in determining any deficiency against the petitioner for excess profits taxes for the years ended in 1943 and 1944.

IV.

The said petitioner, being aggrieved by the findings of fact and conclusions of law contained in the

Findings of Fact and Opinion of the Tax Court promulgated July 31, 1950 (15 T.C..... No. 7) and the decision entered pursuant thereto on February 7, 1951, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

Dated, May 1, 1951.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
Counsel for Petitioner.

Duly Verified.

Received and Filed T.C.U.S. May 4, 1951.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 19283

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF CONTENTS OF RECORD ON REVIEW

Hawaiian Freight Forwarders, Ltd., petitioner on review, by and through its attorneys, Louis Janin and Harold E. Haven, hereby designate the portions of the record and the evidence to be included in the

record on review in the above entitled proceeding, as follows:

The entire record exclusive of formal headings.

You are hereby respectfully requested to prepare and certify the record on review in accordance with the foregoing designations and in accordance with the law and the rules of the United States Court of Appeals for the Ninth Circuit, and to transmit the same to the Clerk of said Court for filing.

Dated: May 2, 1951.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
Counsel for Petitioner.

Received and Filed T.C.U.S. May 4, 1951.

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To the Commissioner of Internal Revenue, and to Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Internal Revenue Building, Washington, D. C.

You are hereby notified that the petitioner, on May 2, 1951, mailed for filing with the Clerk of the Tax Court of the United States, Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court of the United States heretofore rendered in the above entitled cause. A copy of the peti-

tion for review is hereto attached and served upon you.

Dated this second day of May, 1951.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
Counsel for Petitioner.

Acknowledgment of Service attached.

Filed T.C.U.S. May 9, 1951.

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING DESIGNATION OF CONTENTS OF RECORD ON REVIEW

To: Charles Oliphant, Chief Counsel, Bureau of Internal Revenue

You are hereby notified that Hawaiian Freight Forwarders, Ltd., did, on the 4th day of May, 1951, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a designation of contents of record on review for the Ninth Circuit, in the above entitled case. Copy of the designation of contents of record on review as filed is hereto attached and served upon you.

Dated this 8th day of May, 1951.

/s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the U. S.

Acknowledgment of Service attached.

Filed T.C.U.S. May 9, 1951.

The Tax Court of the United States

Docket No. 19283

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Court Room 421, Appraisers Building,
San Francisco, Calif., Friday, May 13, 1949
(Met, pursuant to notice, at 2:45 o'clock p.m.)

Before: Hon. Ernest H. Van Fossan, Judge.

Appearances:

Louis Janin, Esq., appearing on behalf of Petitioner.

W. J. McFarland (Hon. Charles Oliphant, Chief Counsel, Bureau of Internal Revenue) appearing for the Respondent. [1*]

PROCEEDINGS

The Clerk: Docket No. 19283, Hawaiian Freight Forwarders, Ltd.

Will you state your appearances?

Mr. Janin: Louis Janin, appearing for the Petitioner.

Mr. McFarland: W. J. McFarland, appearing for the Respondent.

Mr. Janin: If your Honor please, this proceeding involves Section 740 to 744 of the Internal Revenue Code, commonly known as Supplement A, and

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* Page numbering appearing at top of page of original certified Reporter's Transcript.

it involves the liability of the Petitioner for excess profit taxes for its year ended November 30, 1943, in the amount of $21,424.70, and for the year ended November 30, 1944, in the amount of $7,403.23.

Your Honor may recall that you previously heard a case involving the same Petitioner, I believe, the last time you were here in San Francisco.

The Court: It did not involve the same question?

Mr. Janin: It involved the same question as an auxiliary issue, which became unnecessary in view of your determination on the principal issue, your Honor.

The basic issue involved is whether Petitioner is entitled to the benefits of Supplement A, as amended, by the Revenue Act of 1942, for its fiscal year ended in 1943, and the year subsequent thereto, and also whether Petitioner effectively elected to have those provisions, as amended, by [3] the Revenue Act of 1942, apply to these earlier years.

The Petitioner was organized on March 14, 1940, and by April 1 of that year had acquired the business and principal assets of the predecessor partnership. This partnership was organized under the name "Hawaiian Freight Association", in January of 1937, and then consisted of three partners:

J. C. Leffel, G. C. Ballentyne, and Dr. A. G. Schnack. Dr. Schnack's interest was that of an investor, rather than that of an active partner. On March 8 of 1940, just six days prior to the formation of the Petitioner corporation, Dr. Schnack's interest was acquired, in effect, by Mr. Ballentyne. Dr. Schnack then withdrawing from the partnership.

For the remainder of the short period in 1940, that left two partners, Ballentyne and Leffel, sharing equally in the profits. By April 1, the transfer to the corporation was completed.

The basic issue, therefore, resolves itself to the determination of whether or not withdrawal by Dr. Schnack on March 8, 1940, effected such a dissolution and termination of the partnership that it was not a component corporation under the provisions of Supplement A. In other words, if there were two partnerships, rather than one partnership, involved, the Government was entitled to win in this proceeding.

It is the Petitioner's position, of course, that that withdrawal did not in and of itself effect dissolution [4] of the partnership. The business as continued without interruption, and Dr. Schnack at no time performed services of a business nature to the partnership, but was in the position of a static investor. His withdraw, therefore, did not affect the operations of the business in any respect. Furthermore, under the laws of the Territory of Hawaii, while the withdrawal of a partner may be a cause for dissolution, it does not ipso facto effect a dissolution. At least, where more than two partners are involved.

The Court: They have adopted the Partnership Act?

Mr. Janin: Yes, quite comparable in some respects to the Uniform Partnership Act, although the statutory law in Hawaii is by no means as well expressed or codified as is true under the Uniform Partnership

Act. There is a provision, for example, under the Hawaiian law, for a dissolution to be effective, a certificate of dissolution must be executed and filed by the partners with the Treasurer of the Territory of Hawaii. In this case, that was not done until July of 1940.

With respect to the other issue involved, that is, the election made by the Petitioner, the Revenue Act of 1942, amending the provisions of Supplement A, made those applicable to the Petitioner for the first time. Petitioner, however, had believed that it was entitled to the provisions of Supplement A for its prior years and all of its excess profit tax returns have been computed on the theory that it was so [5] entitled. The error made by the Petitioner and by its accountants are also adopted in two revenue agents' reports, and it is the position of the Petitioner in this case that it so effectively complied with the regulations with respect to the election that its failure to formally state that it made the election, the only thing that was omitted, should not govern against it.

I might say that all of the pertinent facts in the issues have been stipulated.

The Court: Mr. McFarland.

Mr. McFarland: If the Court please, as Mr. Janin has stated, the primary issue is whether the Petitioner is entitled to compute its excess profits credit under the provision of the Supplement A, as provided by Section 740 to 744 of the Code.

With respect to the first consideration on that

broad issue, as framed by the pleadings, it is the Respondent's position that, in effect, with the agreement of March 8, 1940, whereby Dr. Schnack ceased participation in the partnership, in effect, terminated that partnership, and another partnership was created, in which Ballentyne and Leffel were the partners. It was their experience that the Petitioner here acquires and is not entitled, under the provisions of the Code and the regulations, to acquire the experience of the prior partnership, that is, the partnership that was in [6] existence prior to March 8, 1940. That is the basic issue, and the facts reveal that the second partnership, if I might so typify it, did not begin its existence before March 8, and this is directly in face of the requirements of Section 712(a) to the effect that a domestic corporation must compute its excess profit credit under Section 714, unless its existence prior to January 1, 1940, be established through a component corporation, in accordance with Section 740(f). It is also contra to the application of Section 740(c), which requires a component corporation to be in existence on the date of the beginning of the taxpayer's base period. The facts with respect to the issue have been stipulated and also the facts with respect to the issue around about the election have been stipulated.

It is the Respondent's position in that connection that the Petitioner could not have either actually or effectively complied with the terms of an election before that election became applicable, and the provisions of the 1942 Act first contend the necessity or the provisions or an election in certain cases, and

this happens to be one of them. The Petitioner's excess profits tax returns for the years 1940 and 1941 had been filed prior to the enactment of the Revenue Act of 1942, upon which the regulations with respect to the election were promulgated. Now, that issue, however, is pertinent only insofar as it determines the nature and [7] the extent of the excess profit credit and carry forward for the years 1940 and 1941.

I believe that adequately covers the issues, doesn't it, Mr. Janin?

Mr. Janin: You had suggested at one time, Mr. McFarland, that you might make an issue of the transference of substantially all of the assets of the partnership. I believe that issue may be, I should say, rather than "issue", that is the position that I will avail myself of upon brief, based upon the facts that we have stipulated, and that position, of course, is based upon the Court's decision in the Renfro Drug Company case. That has to do with the transference of a substantial or an unsubstantial portion of the assets between the Petitioner's predecessor, the partnership, and the petitioner, but that will be apparent, I am sure, upon brief, and there will be no misunderstanding on that point.

There is one amendment that I would like to make to my opening statement. That is, even if this Court holds that there are two partnerships involved here as predecessor and the Petitioner corporation, the Petitioner will argue on brief that the regulations which prohibit the tacking on of partnership experience was void.

The Court: You may submit the stipulation. Are there exhibits attached to it?

Mr. McFarland: There are, if the Court please. [8] The last exhibit is 2(B).

The Court: The stipulation is received as evidence in the case.

Do you have anything further to submit?

Mr. Janin: Yes, I have a number of exhibits, if your Honor please.

The Court: You may proceed.

Mr. Janin: I will offer in evidence at this time a certified copy of the Statement of Co-Partnership from the Hawaiian Freight Association, filed and recorded in the Office of the Treasurer of the Territory of Hawaii, on February 20, 1937.

Mr. McFarland: No objection.

The Court: Exhibit 3.

(Whereupon, the document marked Petitioner's Exhibit 3 was received.)

[Printer's Note: Petitioner's Exhibit 3 is set out in full at pp. 119-121 of this printed record.]

Mr. Janin: I will offer at this time a certified copy of the Statement of Dissolution of the Co-Partnership of the Hawaiian Freight Association, filed and recorded in the same office on July 3, 1940.

Mr. McFarland: No objection.

The Court: Exhibit 4.

(Whereupon, the document marked Petitioner's Exhibit 4 was received.)

[Printer's Note: Petitioner's Exhibit 4 is set out in full at pp. 122-124 of this printed record.]

Mr. Janin: I will offer at this time a certificate [9] of the Treasurer of Hawaii to the effect that no statement of any other partnership under the same name and style was at any time prior to April 30, 1940, registered with the Treasurer.

Mr. McFarland: No objection.

The Court: Exhibit 5.

(Whereupon, the document marked Petitioner's Exhibit 5 was received.)

[Printer's Note: Petitioner's Exhibit 5 is set out in full at page 125 of this printed record.]

Mr. Janin: I will offer at this time the report of Tennent & Greancy, covering the year ended November 30, 1940.

Mr. McFarland: No objection.

The Court: Is this a financial report?

Mr. Janin: This is an audit report, yes.

The Court: Exhibit 6.

(Whereupon, the document marked Petitioner's Exhibit 6 was received.)

Mr. Janin: I will offer at this time for the limited purpose of showing that the Internal Revenue agents in making audits of the return of the Hawaiian Freight Forwarders, Ltd., originally determined that it was entitled to the benefits of Supplement A without an election, the report submitted to the taxpayer, dated June 2, 1944, covering the fiscal year ended November 30, 1941.

The Court: Exhibit 7.

(Whereupon, the document marked Petitioner's Exhibit 7 was received.) [10]

[Printer's Note: Petitioner's Exhibit 7 is set out in part at page 126 of this printed record.]

Mr. Janin: I likewise offer a similar report submitted to the taxpayer on February 19, 1945, and covering the year ended November 30, 1942.

The Court: Exhibit 8.

(Whereupon, the document marked Petitioner's Exhibit 8 was received.)

[Printer's Note: Petitioner's Exhibit 8 is set out in part at page 127 of this printed record.]

Mr. Janin: I have no further exhibits to offer, your Honor.

Mr. MacFarland, will you stipulate that if Dr. A. G. Schnack were present and called as a witness on behalf of the Petitioner, he would testify to the following effect:

That he is a physician and surgeon, now residing in Corona, California, but formerly and until March 31, 1940, he resided in Honolulu, Territory of Hawaii, and that from January 2, 1937 until March 8, 1940, he was a member of a partnership known and designated as Hawaiian Freight Forwarders, Ltd., engaged in the freight forwarding business; that he rendered no services to said partnership in its ordinary day to day business operations; and that he did not, except for once or twice a year, call at the

partnership offices; and that on occasions, which were rather infrequent, his primary purpose was social rather than business, he did inquire of Mr. G. C. Ballentyne, an active partner, as to the status of the partnership and its business; that he did not offer suggestions as to the conduct of such business; and that his withdrawal [11] from the partnership on March 8, 1940, was with the consent of his co-partners, Mr. Leffel and Mr. Ballentyne.

The Court: Do you stipulate to that?

Mr. McFarland: So stipulated.

I have some returns that I would like to introduce, if the Court please.

The Court: Proceed. There will be no objections to these returns?

Mr. Janin: No objections to the returns.

Mr. McFarland: Respondent's Exhibit C, the 1936 income and excess profits tax return of the Hawaiian Freight Association, Ltd.

The Court: Exhibit C.

(Whereupon, the document marked Respondent's Exhibit C was received.)

Mr. McFarland: Respondent's Exhibit D, the final partnership return of income for 1940 of the Hawaiian Freight Association.

The Court: Exhibit D.

(Whereupon, the document marked Respondent's Exhibit D was received.)

Mr. McFarland: Respondent's next exhibit in order, the final return, amended, of the Hawaiian

Freight Association, being a partnership return of the income for 1940.

The Court: E follows. [12]

Mr. McFarland: Thank you very much.

(Whereupon, the document marked Respondent's Exhibit E was received.)

[Printer's Note: Respondent's Exhibit E is set out in part at page 129 of this printed record.]

Mr. McFarland: Respondent's Exhibit F, a corporation income and declared value excess profits and defense tax return for 1940 of the Hawaiian Freight Forwarders, Ltd.

The Court: Exhibit F.

(Whereupon, the document marked Respondent's Exhibit F was received.)

Mr. McFarland: Respondent's Exhibit G, the corporation excess profits tax return of the Hawaiian Freight Forwarders, Ltd., for the taxable year 1940.

The Court: Exhibit G.

(Whereupon, the document marked Respondent's Exhibit G was received.)

Mr. McFarland: Respondent's Exhibit H, the Hawaiian Freight Forwarders, Ltd., corporation income and declared value and excess profits tax return for the taxable year November 30, 1941.

The Court: Exhibit H.

(Whereupon, the document marked Respondent's Exhibit H was received.)

Mr. McFarland: Respondent's Exhibit I, the cor-

poration excess profits tax returns of Hawaiian Freight Forwarders, Ltd., for the taxable year ended November 30, 1941.

The Court: It will be received. [13]

(Whereupon, the document marked Respondent's Exhibit I was received.)

Mr. McFarland: Respondent's Exhibit J, the corporation income tax return of the Hawaiian Freight Forwarders, Ltd., for the taxable year November 30, 1942.

The Court: Exhibit J.

(Whereupon, the document marked Respondent's Exhibit J was received.)

Mr. McFarland: Respondent's Exhibit K, the corporation excess profits tax return of the Hawaiian Freight Forwarders, Ltd., for the taxable year November 30, 1942.

The Court: Exhibit K.

(Whereupon, the document marked Respondent's Exhibit K was received.)

Mr. McFarland: Respondent's Exhibit L, the corporation income and declared value excess profits tax return of the Hawaiian Freight Forwarders, Ltd., for the taxable year November 30, 1943.

The Court: Exhibit L.

(Whereupon, the document marked Respondent's Exhibit L was received.)

Mr. McFarland: Respondent's Exhibit M, the

corporation excess profits tax return of the Petitioner for the year ended November 30, 1943.

The Court: Exhibit M. [14]

(Whereupon, the document marked Respondent's Exhibit M was received.)

Mr. McFarland: Respondent's Exhibit N, the corporation income and declared value excess profits tax return of the Petitioner for the year ended November 30, 1944.

The Court: Exhibit N.

(Whereupon, the document marked Respondent's Exhibit N was received.)

Mr. McFarland: Respondent's Exhibit O, the corporation excess profits tax return for the Petitioner for the taxable year ended November 30, 1944.

The Court: O is received.

(Whereupon, the document marked Respondent's Exhibit O was received.)

Mr. McFarland: Respondent's Exhibit P, the corporation income and declared value excess profits tax return of the Petitioner for the taxable year ended November 30, 1945.

The Court: Exhibit P is received.

(Whereupon, the document marked Respondent's Exhibit P was received.)

Mr. McFarland: Respondent's Exhibit Q, the corporation excess profits tax return of the Petitioner for the taxable year ended November 30, 1945.

The Court: Exhibit Q.

(Whereupon, the document marked Respondent's Exhibit Q was received.) [15]

Mr. McFarland: Respondent rests.

The Court: This case lends itself to simultaneous briefs, doesn't it?

Mr. McFarland: Very well.

The Court: How much time do you want?

Mr. McFarland: Thirty days.

The Court: Thirty days for original briefs, and serve copies on each other.

Mr. Janin: I would like a longer period for the reason that I have two cases in the Circuit Court that, I believe, are coming on shortly. That will interrupt my briefing time.

The Court: Forty-five days?

Mr. Janin: Forty-five days.

The Court: With twenty days for reply? Serve copies on each other?

Mr. Janin: Yes, sir.

Mr. McFarland: Very well.

The Court: That concludes the calendar.

We will recess until Monday morning at 9:30.

(Whereupon, at 3:10 o'clock p.m., the hearing in the above-entitled matter was concluded.) [16]

[Endorsed]: Filed June 3, 1949.

[Title of Tax Court and Cause.]

Court Room 421, Appraisers Building,
San Francisco, Calif., Wednesday, Nov. 1, 1950
Before: Hon. Bolon B. Turner, Judge.

PROCEEDINGS

The Clerk: Docket No. 19283, Hawaiian Freight Forwarders, Ltd.

Louis Janin for the Petitioner.

T. M. Mather for the Respondent.

Opening Statement on Behalf of the Petitioner
By Mr. Janin

Mr. Janin: If Your Honor please, you entered a decision in this case, a findings of fact and opinion in this case, a little over two months ago, and on receipt of the taxpayer's copy of the same we were definitely dissatisfied with it and we filed motions for a correction and an enlargement of the findings of fact and opinion, and for reconsideration of the issues presented to the Court.

I think a part of the difficulty which the Court had with the case was definitely my own fault. I think that part of it was a mis-interpretation of the opening statement made by counsel for both sides, and part of it was due, perhaps, to your not having the personal knowledge of the background of the case that was true of Judge Van Fossan, to whom the proceeding was presented.

This case was an aftermath of a prior case which had been presented to Judge Van Fossan and decided by him prior to the hearing in this matter. Therefore, in presenting the case before Judge Van Fossan there was less put into the [3] record than would otherwise have been definitely considered as necessary.

The Court: Why do you say that? He could only decide it on the record, regardless of what he had known outside the record.

Mr. Janin: He would decide it on the record and

by taking judicial notice of the record in the prior proceeding before the Tax Court involving the same parties.

The Court: We were recently reversed on that in the Funk case.

Mr. Janin: I am not familiar with that decision.

The Court: We had our knuckles very severely cracked on a mistaken impression, that is, where we had taken judicial notice of another proceeding involving the same parties in the Funk case.

Mr. Janin: I do not recall that.

The Court: That was a Third Circuit case.

Mr. Janin: I do not recall that.

The Court: I, as a matter of fact, know something about the prior proceeding. I was Presiding Judge when Judge Van Fossan decided the other case, and the Presiding Judge reviews all reports of the other fifteen judges to determine whether or not they are to go out, or whether they go to Conference. So I was aware of the other case.

Mr. Janin: Yes. [4]

The Court: All right. Go ahead.

Mr. Janin: In the opening statements made before this Court, with Judge Ernest Van Fossan presiding, there were two principal issues presented for the Court's decision, as stated by counsel.

The first issue was whether the change in the partnership which occurred by reason of Dr. Schnack's withdrawal on March 8, 1948, made it impossible for this Petitioner to utilize its predecessor's earnings.

The second issue was applicable only for excess

profits credit carry-over purposes, and that was whether the Petitioner had failed to make sufficient election and was, therefore, barred from the retroactive application of the provisions of Supplement A.

In addition to that, Mr. McFarland, who was at that time a representative of the Chief Counsel's Office, stated that he intended to raise an issue that not substantially all of the assets of the predecessor partnership had been transferred to the petitioner corporation, and that he would make his position on that issue clear in his brief. I think an examination of his brief shows he did clarify that statement and that he was contending was that there was cash representing earnings, or earnings represented in the form of cash of the partnership which had not been transferred to the corporation and that he at no time was contending that [5] there were operative properties of any kind which had not been transferred to the corporation and that, Your Honor, is the fact. All the properties utilized by the partnership in this freight forwarding business were transferred to the petitioner corporation.

As a matter of fact, Your Honor did find, on Page 4 of the mimeographed opinion "the petitioner in exchange for its 6,000 shares of stock received the going business of Hawaiian Freight Association and most, if not all, of its remaining assets."

Later on in your Findings of Fact and Opinion you found that substantially all of the assets had not been transferred.

The Court: I think we ought to come to an understanding here on one point, because I think that that

will have a bearing on your development of what you have to say.

In the first place, I made no Findings of Fact.

Mr. Janin: You made no formal findings, no.

The Court: The facts were stipulated and I found them as stipulated. So your formal findings of fact are your stipulated facts. Any discussion here may be subject on your part, and I assume it is, to the feeling that I have in my discussion, and applying the law, misconstrued the Findings of Fact. But the Findings of Fact in this case are [6] the stipulated Findings of Fact. I made no Findings of Fact.

Mr. Janin: I did not understand that clearly. I am glad you brought it out. I remember the reference in the opinion to the facts as stipulated.

The Court: It is stated in the opinion, "the facts have been stipulated and as stipulated are so found." You will notice I made no Findings of Fact.

Mr. Janin: That is right. Of course, the Findings of Fact can appear in the body of the opinion, and I think that when there is a factual discussion in the body of the opinion that certainly an ambiguity arises as to whether the statements of fact so appearing are not findings.

The Court: The Ninth Circuit says "No." The Ninth Circuit is very decided on that point. They will not accept a statement, even if you say in your opinion that the fact is thus and so, and we so find over in the opinion. They have thrown that out and have remanded cases to us for doing that. So here in the Ninth Circuit particularly anything stated as

a fact, as a discussion in the opinion, they insist on segregated and separate findings where that is so.

That is one reason why we are very careful about that in the Ninth Circuit.

Mr. Janin: In the Findings of Fact and Opinion, as rendered by the Court, there are two bases for the Court's [7] decision:

One, that substantially all of the assets were not transferred to the petitioner corporation.

The other is that the transaction did not qualify as a tax-free transaction under Section 112(b)(5) of the Internal Revenue Code.

Now, as to the latter point, of course, it is I think very clear, from reading the opening statement of counsel before the Court, that Section 112(b)(5) was not an issue presented to the Court for its consideration. The deficiency notice determined the transfer to be tax-free. There was no step-up of bases on any of the assets, or no change in bases whatever with respect to any of the assets transferred from the predecessor partnership to the corporation and utilizing, as it did, the invested capital method, the Commissioner's determination of excess profits credit is predicated on the cost of the assets to the predecessor partnership. In fact, the Revenue Agent's reports and deficiency notices, which appeared as exhibits to the petitions in the two prior docketed proceedings, disclosed that the Commissioner was perfectly satisfied that Section 112(b)(5) had been fully met and that we had a tax-free transfer here.

Again, in the Agent's reports, which were introduced as exhibits in this case, Section 112(b)(5) was

recognized as being applicable and contrary to the position [8] later taken in the deficiency notice where the Supplement A provisions were treated as being applicable.

Mr. McFarland had been the Government counsel in the prior proceeding also and, of course, Mr. McFarland and myself had discussed the issues at quite some length. I think we had a very complete understanding as to what the issues were and I think it was unfortunate that we did not perhaps more clearly limit our statement of the issues to the Court so that there wouldn't have been any opportunity for confusion on the matter.

Mr. McFarland's point on the other issue on which the Court rendered its decision was merely that the partnership should have retained its cash earnings and transferred those to the corporation.

The Court: What is that statement again?

Mr. Janin: Mr. McFarland's position was that the partnership should have retained its earnings in the form of cash and transferred that cash to the petitioner corporation in order to qualify under Section 112(b)(5). There was never any contention on Mr. MacFarland's part that their operative properties of the business were not transferred. I think perhaps the term "asets" and "properties" deserve a little further consideration.

The Court: Before you pass on, I think you will find in here—I haven't looked at this for some time—but [9] I think you will find in here that in my treatment of the case my findings are based on the determination that the parties themselves made of

the partnership interest as of the beginning of this short period. I think that somewhere in here I commented that as to any profits that were realized between the first of the year and the other, I didn't know what happened to those; I didn't know what they were. So, on the factual situation that is covered in "3" and "4", where I was going to determine for myself, for discussion, the facts there because some of the facts as stipulated required a little mathematical computation, but not any change of facts.

I pointed out in the footnote that the distributions that were made, and the payoff made as to partnership interest, were on the basis of the reports of the Certified Public Accountants showing the partnership interests at December 31, 1939, and it was on the basis of that that the amount was determined that Dr.—what is the name?

Mr. Janin: Dr. Schnack.

The Court: ——Dr. Schnack got.

Mr. Janin: He received $8,000.00 on March 8.

The Court: That was not a matter of earnings. The $8,000.00 that Dr. Schnack received, that was his partnership share.

Mr. Janin: His entire partnership share of both [10] profit and accumulated earnings.

The Court: That was the basis of my determination.

Mr. Janin: I am sorry, Your Honor, but I do not think that is very clear from a reading of the opinion.

The Court: Well, perhaps you can show me where

it isn't. I will say this for you: That I do think you had a bad stipulation of facts, and I think it was very difficult to read those facts and to know just exactly what the facts were. You had to, in order to verify some of the things in the facts, take a pencil and sit down and do some computing to verify some of the things that were in there. The difficulty experienced with that is the reason why I made it clear that my discussion on Page 4, for instance, was drawn from the stipulation of facts, and that that was my statement on Page 4, but that the facts were stipulated as set forth in the footnote. In order that no one would be misled as to what was stated in my discussion, I set that forth in a footnote to show what you did stipulate.

Mr. Janin: I think the pertinent portion of your discussion——

The Court: Those statements down there, the break-down between capital and undrawn profits, that was taken from one of your exhibits as a part of your stipulation of facts.

Mr. Janin: Yes. The stipulation of facts discloses [11] that the total of the partnership capital and undrawn profits, at December 31, 1939, was approximately $30,000.00—I think it was slightly over $30,000.00—and there was $30,000.00 of assets, cash and other assets, transferred to the petitioner corporation.

The Court: Except on one of your exhibits, as a part of your stipulation as to the assets received by the Hawaiian Freight Association, as to what it got, and that is a stipulated fact—I didn't try to analyze it but I took it as a stipulation of fact—is

not \$30,000, but is \$120,000, and \$90,000 of that is good-will. And because that was at variance with the statement that what the corporation did get was \$30,000, that was the occasion for my footnoting at the bottom of Page 4, "The stipulation gives no explanation of the wide margin of difference between the allowance therefor to Schnack under the March 8 agreement and the \$90,000 at which it was carried in the Petitioner's books."

Mr. Janin: I think we should have footnoted our stipulation of facts on that to show that the \$90,000 good-will had not been carried on the partnership books as having any cost.

The Court: I assume that as so.

Mr. Janin: The subtraction of the \$90,000 from the \$120,000 leaves \$30,000 of assets which were actually [12] transferred to the petitioner corporation.

The Court: The point is that if it was there it was an asset, it had value. It would have something to do with what the corporation acquired from the partnership, whichever partnership it was acquired from.

I think maybe it would be better to let you go ahead with your statement here and I will try and reserve any queries that I have until later because if there are any things I have not given proper weight and attention to, why, naturally I want them pointed out to me.

Mr. Janin: Commencing at the bottom of Page 8 of the Findings of Fact and Opinion there is a discussion concerning the transfer to the petitioner corporation and which discloses that Leffel's account

showed a balance of $17,000 (odd) and Ballentyne's account showed a balance of $11,000 (odd), consisting both of capital and undrawn profits of the partnership at January 1, 1940.

Then the Findings of Fact and Opinion go on to state "the record is silent as to withdrawals by any of the three partners except for Schnack's withdrawal of $8,000.00."

I took that, at the time of filing my Motion for Correction and Enlargement of the Findings of Fact, as a statement that there was no showing in the record of any withdrawals, and I think that I misinterpreted the Court on that, that that refers only to the year 1940 because the [13] stipulated facts do show the withdrawals prior to January 1, 1940 by all of the partners.

For example, it is shown that in general there were withdrawals of current earnings and the following year the earnings for the preceding year were fully drawn.

The Court: Yes. That is intended to be covered by my recitation and the reason I put in this footnote at the bottom of Page 4. That statement that was put in there, the accountant's statement disclosed much of that.

Mr. Janin: Then you went on to state:

"Inasmuch, however, as petitioner received only $30,000 of the partnership assets, exclusive of goodwill, it would appear that withdrawals were made by Leffel and Ballentyne in unknown amounts and proportions."

I think, in that connection, we have to assume that

any withdrawals were made in proportion to their partnership interests.

Then you go on to say:

"There is no contention, however, that such withdrawals as were made were not in keeping with the prorata interests of the two individuals in the partnership as they originally existed, due effect being given to the withdrawal by Schnack of his interest."

Then from that you conclude in the next paragraph:

"From the above we think it clear that it may not [14] be said that petitioner acquired substantially all of the assets of the Hawaiian Freight Association in exchange for its stock and accordingly it does not meet the test of Section 740(a)(1)(D), supra." Then citing E. T. Renfro Drug Company.

Again, I do not think it is at all clear as to just what the basis of that determination is. I feel that the Court should make it clear just on what basis it is deciding that issue. It is not at all clear whether it would require all of the earnings of the partnership to remain intact for that partnership to qualify under Section 740(a)(1)(D), and I do not think there is any such requirement in the law.

In that connection I think the Court's use of the word "assets" is perhaps a material consideration. That is not the word used in the statute. The word in the statute is "properties." I think the statute definitely contemplates it is the properties of a partnership which gave rise to its profits that are the assets which are to be transferred to the corporation in order for the corporation to avail itself of the

earnings experience of the partnership. That is exactly what was done here. All of the assets, which were productive of the partnership income, were transferred to the corporation.

The Court: The same was true in Renfro Drug.

Mr. Janin: Isn't there another consideration in [15] Renfro Drug? There we had not one partnership, but two partnerships. We had withdrawal by the active partners, rather than withdrawal by the silent partners, and a longer lapse of time before there was a transfer to the petitioner corporation. I do not think the case is on all four with the Renfro Drug case by any means, Your Honor.

The Court: Go ahead.

Mr. Janin: It is my feeling that the case was very much more similar to the case of—I can't think of the name at the moment.

The Court: Ransehoffs?

Mr. Janin: No. It was the Fageol Tool & Die Corporation case——

The Court: Yes.

Mr. Janin: ——wherein the Court held that it wasn't necessary that all of the assets of the partnership be transferred; that the statute had reference to the assets which produced the business and that the partners were entitled to withdraw earnings equivalent to salaries, and for payment of their income taxes, and that sort of thing. I do not think that decision, as a matter of fact, went as far as it should.

We have, for example, the provision made in the statute that it shall be assumed that all earnings

are distributed for the purposes of reconstructing the partnership net income. [16]

I do not think it is required that partnership earnings and capital, for the partner to qualify under Section 470(a)(1)(D) should continue to mount without any diminution or distribution of earnings.

We are looking at the partnership as though it were a corporation and I think, consequently, we can take into consideration that the normal progress of any business requires that some earnings be distributed.

The Court: I think you can forget the earnings proposition because I clearly wrote those out in my opinion on that. I do not have to decide that. I didn't need to here for this decision. So I think you can quit worrying about the earnings.

I didn't know what happened to the earnings. We know what the partnership interest was at January 1, 1940, and on the basis of that Dr. Schnack got $8,000.00. We do know that there were $27,000.00 of earnings between that time, but only $30,000.00 went to the corporation. So I presume that maybe they distributed them. I don't know. Maybe it was prorated. I don't know.

So I really think you had better get back to your partnership interest. I wrote the earnings out.

Mr. Janin: I don't see, then, the basis for your conclusion that "it may not be said that the petitioner acquired substantially all of the assets of the Hawaiian [17] Freight Association in exchange for its stock."

What assets didn't they acquire?

The Court: They didn't acquire Dr. Schnack's partnership interest because he was paid off, bought out.

Mr. Janin: We start off with $30,000.00 of capital on January 1, 1940 and $30,000.00 of capital was transferred.

The Court: What do you mean "capital"?

Mr. Janin: I mean we start off with $30,000.00 partnership assets on January 1, 1940 and that is the amount of assets which were transferred by the partnership to the corporation.

The Court: It doesn't make any difference about that, the same amount of assets. If you go out and buy some assets, they have got to be assets of the same outfit. Schnack was plainly out. He was bought out, the same as a partner was in Renfro Drug, and bought out for cash. In Renfro Drug they acquired all of the operating assets, but they paid him off in cash. We hold that that was not within Section 740(a)(1)(D) there and under that we hold that it is not under 740(a)(1)(D) here.

Schnack took his partnership interest out. The fact that the others acquired for cash his part, or he took down in cash his part, wouldn't make any difference.

There is a lot of difference between a distribution [18] of profits that you are talking about in your Fageol Tool, or the using of cash on hand to pay debts, because those debts are due and have to be paid anyhow. They are received subject to debts, if they are not paid before.

But here this company didn't acquire Schnack's interest.

Mr. Janin: What was Schnack's interest? It wasn't an interest in any specific assets of the partnership.

The Court: You tell me.

Mr. Janin: He was only interested as sort of a limited partner.

The Court: You tell me what his interest was.

Mr. Janin: That is what I am saying. The statute refers to it.

The Court: Schnack, according to the exhibits, had a capital interest.

Mr. Janin: That is perfectly true, he had a capital interest in the partnership. He has no interest in the partnership assets. That would be the case under California law.

The Court: He had the same interest as any other partner does.

Mr. Janin: But the statute refers to the partnership properties; not a transfer of the partnership interest held by each partner. [19]

The Court: That was the argument made in the Renfro case, the case presented by Renfro Drug.

Mr. Janin: I do not see that the Renfro case is at all in point here.

The Court: Go ahead.

Mr. Janin: As Your Honor pointed out earlier in this opinion the withdrawal of Dr. Schnack can be ignored.

The Court: It cannot be ignored.

Mr. Janin: That is the way I understand it.

The Court: That is one of the prime considerations in here because the partnership that this petitioner wants to be the successor of was a partnership of which Dr. Schnack was very much a part.

Mr. Janin: On Page 6 of the Opinion you have stated:

"The parties have devoted much of their briefs to arguments whether the withdrawal of Schnack effected a termination or dissolution of the partnership Hawaiian Freight Association or whether, as in this case, there being no provision in the partnership agreement specifically providing that the withdrawal of a partner should not terminate the partnership, the partnership did continue by operation of Hawaiian law with Leffel and Ballentyne as the partners during the period from March 8, the date of the agreement covering the withdrawal of Schnack, to April 30 when the [20] transfer of the business to petitioner was finally and fully completed."

There is one misstatement in that paragraph. The correct date should be either March 31 or April 1, rather than April 30.

The Court: That is a typographical error.

Mr. Janin: You go on to say:

"It is not necessary in our opinion to take up and discuss the arguments so made since here the facts and the applicable provisions of the statute never permit us to reach a point where such arguments might be material. * * * Here there was no intention on the part of any one that the partnership should continue. The agreement in substance was that subject to Schnack's withdrawal the petitioner would

be organized to take over the business and most, if not all, the remaining assets of the partnership, Hawaiian Freight Association."

And then you point out:

"* * * that the necessary steps to move to petitioner the business and that part of the assets it did require began immediately, even though three weeks was required to complete all business already initiated."

Then you further state:

"We have no occasion, therefore, to concern ourselves with the law of Hawaii as to the continuation of [21] the partnership after the withdrawal of a partner since for the purposes here we have no such case."

The Court: That is right.

Mr. Janin: Then you cite the Ransehoffs decision.

The Court: We do not have any such case here, because here this whole thing, all of these steps were in one transaction and for one purpose, that was for Schnack to withdraw and the Hawaiian Freight Forwarders to acquire the business of the going partnership, which consisted of Leffel, Ballentyne and Schnack.

I didn't consider it necessary to discuss the law of Hawaii as to whether or not there might be a situation where, if there was a withdrawal of one partner, the partnership would continue, as in the case of Ransehoffs, because obviously these facts showed that that was not in the picture here at all. They didn't have any idea of continuing any business partnership with Leffel and Ballentyne.

Mr. Janin: For a period of time, but for the purpose of winding up.

The Court: It was all a move to carry the business of the Hawaiian Freight Forwarders, consisting of Ballentyne, Leffel and Schnack, to this corporation, with Schnack out, which is exactly the same thing as was true in the case of Renfro.

In Renfro Drug they were carrying the business of [22] the drug concern over to a corporation, with one of the partners out, being paid off, taking down his share. There wasn't any idea of any intervening operation. It was all a transitional operation.

In here somewhere there is provision which is made to show that that was the situation here, because I drew a line with respect to business in transit to show that there was no thought or idea of setting up any intervening partnership, and while I didn't find it necessary to go into it, and I do not know whether we have specifically ruled on it or not, but you would have then to meet the question as to whether or not, if you did have an intervening partnership—and it was argued in one of the briefs——

Mr. Janin: Right.

The Court: ——that this corporation could jump over the intervening partnership and get the benefit of the earnings record of the old partnership. So, for your own case, it is desirable that you have no intervening partnership, and when you have no intervening partnership, then you do not have this company acquiring the old partnership. They acquire less Schnack's interest, as in the Renfro Drug Company case.

Mr. Janin: I think, Your Honor——

The Court: I could have gone into a long extended discussion of that, but it seemed to me perfectly clear that that is the situation here, and that what I have said shows that [23] that is the situation.

Mr. Janin: I think, if Your Honor please, that your use of the word "assets" in here is very unfortunate and I think you are losing sight of the whole purpose of Section 740(a)(1)(D) which was that when a predecessor's business was acquired by a corporation in a tax-free exchange under Section 112 (b)(5), and the operative properties of that predecessor business are transferred in that transaction, that the successor was entitled to compute its excess profits credit by reference to the earnings of the prior business. That is the broad purpose of Section 740(a)(1)(D), though there may be certain restrictions. I think the purpose for substantially all of the properties was very clear. It wasn't the Congressional purpose to permit a split-up of a predecessor business and have half of the assets go to one corporation and half of the assets to go to another, and have both of the corporations entitled to utilize the earnings experience of the prior business. I think that is clearly the purpose of that restriction.

The Court: As I understand it, then, on your theory it wouldn't make any difference who owned the business prior to the change-over, whether the ownership of the business changed or not.

Mr. Janin: I do not think that was really material from the Congressional standpoint, whether the ownership of the [24] business changed or not.

The Court: You don't have to have continuity of interest at all, and continuity of interest has nothing to do with it, and you think that Congress intended, just so there was an operating business unit here, regardless of ownership or interest, that if the business continued, though under different ownership, that it is entitled to go back and take over the earnings experience of the prior operation?

Mr. Janin: I think that was clearly the Congressional intent in this relief legislation.

The Court: If you think that is so, then the best thing I can say is that it would be a wholesome thing for you to take it on up and get the case on through the courts, because I think that Congress, and I think I have written it so as to show, that while Congress did intend that in certain instances it was going to expand the right to former earnings experience beyond corporations, that Congress did safeguard that expansion, and while it was some relief it said, "We will only grant it so far", and that Congress did clearly intend there was to be a continuity of interest there if they were going to have that right to earnings experience.

Of course, we so held in the Renfro Drug case that where it didn't go, as it had been before, but one person took down his share, even though the operating unit remained [25] the same, he was, so to speak, bought out by taking down his share in cash, that this was not coming within the statute that Congress had laid down.

Mr. Janin: I think, if Your Honor please——

The Court: Just a minute.

Now, in 112(b)(5) there is no requirement for a transfer of all of any group of assets. If assets are transferred by one or more to a corporation and there is, after the transfer, a comparable ownership, and it must be an ownership in substantially the same proportions as before the transfer, then it is a non-taxable exchange and it doesn't matter if it is a part of a block of assets. The important thing in Section 112(b)(5) is that the proportionate ownership must be the same before and afterward.

If that is all Congress wanted, why, it could have just said "112(b)(5) transaction thus and so", but Congress put down another provision. It said, and I grant you it says "substantially all properties", that is the way the statute reads, but it puts that requirement on and says it must be substantially all of the properties within a transaction within 112 (b)(5).

Very obviously, this case does not meet that statutory test. 740 (a)(1)(D) adds something to 112(b)(5).

Now, while I am talking I will just offer a point on your remark about the writing of 112(b)(5) of this case. [26] You said you and Mr. McFarland had agreed, or thought you had agreed that that was not in this case. Well, that is a matter of law. 740 (a)(1)(D) has, as a part of it, and as a part of the law that has to be applied, Section 112(b)(5) and the Court must apply the law as it is written by Congress to the facts that it has before it. When you apply 740(a)(1)(D) and then you follow it through and see that by bringing into that a 112(b)(5) transaction you do have to have continuity of interest

after the transaction as before. In other words, you have to have ownership which is substantially in the same proportions.

You didn't have such ownership here because after it was over with only Leffel and Ballentyne owned the whole thing in proportions wholly out of line with the proportions in which the business or the properties, if you please, were owned before the transaction.

Now, the other part, about whether or not 112 (b)(5) is in the case, I think there is this to be said on your behalf: that Mr. McFarland was not as definite and clear as he might have been in his opening statement and in the discussion that took place at the time the case was submitted as to how far he was going to argue, or how he was going to deal with 112(b)(5). Each time he would say, "We will deal with that on brief." At no time do I find, and did I find in there that he agreed that this was a 112(b)(5) transaction [27] because the remark was always hedged for dealing with it on brief and was, as I grant you, not too definite and clear a statement. But even so, the immediate question of law that this Court had to decide, we had to decide it as it was presented, and apply the law as we found it to the facts that were given and presented. So you cannot, when you look at it that way, find in this law a provision that there is no requirement that the ownership has to be in substantially the same proportions after the acquisition as it was before, because that is the essence of 112(b)(5) as it applies here. 112 (b)(5) says that very distinctly and plainly.

So, when you look at it in that light then you have the Renfro Drug case which, when I wrote this case, we had outstanding, 112 TC 994, and a divided Court, not widely but a divided Court. I do not know whether there are any other cases that have gone up on it since or not, but I do know that Renfro Drug was affirmed in the Fifth Circuit, and took the same view that we have, that you do have to have a continuity of interest, and not only a continuity of interest but in the same proportions before as after.

So I am at a loss to see wherein there is anything that I could do, or should do with my report.

It looks to me that really what you have here is something where you just differ with the Court's view of the law as applied to the facts, and which we considered in a full [28] Court Conference in Renfro Drug, and that the most expeditious way would be to test the law.

You have all the facts that you have given me. It is a question of law. I found your facts as you stipulated them. I could not amplify on your stipulation of facts. You precluded me on that. You stipulated the facts and I said, "I am finding them as stipulated."

Mr. Janin: I think it is unfortunate, in connection with the stipulation of facts, we did not put in the exhibits in the prior proceeding. You tell me you are precluded from taking judicial notice of the record in the prior proceeding. This comes as a surprise to me. I do not pretend to know all the law, but I understood rather clearly that the Tax Court did take judicial notice of the record in other pro-

ceedings before it, particularly when the same parties were involved. Here we had a further coincidence of the same Judge and same counsel.

The Court: We were really given a going-over in the Funk case by the Third Circuit for that very thing. In that case, I will say, there is this difference —well, I don't know there is a difference.

Who were the parties in that case, the other case?

Mr. Janin: The Hawaiian Freight Association vs. the Commissoner of Internal Revenue.

The Court: It is a corporation case? [29]

Mr. Janin: A corporation case.

The Court: The prior one?

Mr. Janin: Yes.

The Court: What year?

Mr. Janin: The fiscal years 1940 and 1941.

As a matter of fact, I do not have anything in my record to show, but it may have been these exhibits were with the Court at the time our second hearing was had.

The Court: I wouldn't know because, as I say, I would not look at any record in another case since the Funk case has come down on judicial notice. I would, if the case were being heard before me, and the record was being made, I would certainly warn counsel I would not take judicial notice and it would be up to them to present it.

There is this difference, if that was the corporation case, the earlier case here: that in the Funk case the same subject matter was involved, but it was a different petition. In the earlier case it was the husband and in the second case it was the wife,

and the question of the taxability of the trust income was the question involved in exactly the same trust. Unfortunately, some matter that was in the earlier case appeared, some of the language, substantially has had been used in the other case. While there was no taking of judicial notice of the other case, the Third Circuit was of the view, and it was argued, that we had taken judicial notice of [30] it, and the Department of Justice noted the similarity of language and they assumed that we had too, and it was conceded that we had, and the Third Circuit, if you will pardon a plain, everyday country expression, "took hide and hair off" and sent it back and said, "Don't you do that. If you are going to do that, look into another record, it must be put in."

Mr. Janin: I would have preferred my record contain this additional exhibit which was an exhibit before the Court in that prior case, and does show the balance sheet as of December 31, 1939.

The Court: You have got that in this case. You have got your auditor's statement of December 31, 1939 in this case. It is in the record.

Mr. Janin: Is it?

The Court: Yes. Your auditor's report is in. That is set out pretty fully. Whether it is a complete balance sheet or not I do not know, but you have an auditor's report of the firm of Certified Public Accountants showing all of the matter that I have in the footnote at the bottom of Page 4. That is where it came from.

Mr. Janin: I think I made a mistake and got the one for 1940 in.

The Court: No, because in 1940 there was no partnership at the end of 1940. [31]

Mr. Janin: That is right.

The Court: Your auditor's report is in there.

Mr. Janin: In my copy of the transcript of the record the reference to the auditor's report is for 1940.

The Court: I don't know about that. I know what was before me because that is where the matter came from that I referred to at the bottom of Page 4.

As I say, I do not think you covered yourself with glory in working up your stipulation of facts. I didn't want to deal unfairly in my determination of the facts, for the purposes of decision, and that is the reason I put in the footnotes that I did, which would show that I had to give my own interpretation of those facts in setting up my basis for applying the law. But all of that comes from your stipulation of facts.

Mr. Janin: Your Honor, it seems rather frivolous to argue this further in view of the position which you have taken on it. I must say, however, that I think that the reason for your conclusion in this opinion is very ambiguously expressed. I am certain that I did not get the reason which you have expressed here this afternoon.

For example, when you state that the receipt by Leffel and Ballentyne on a 50-50 basis of the shares of stock of the petitioner doesn't qualify under Section 112(b)(5) as a tax-free transfer, it seems to me it was running definitely [32] counter to our stipulation of facts which was that after Schnack's with-

drawal Ballentyne and Leffel were equal partners, each owning 50 per cent interest in the partnership.

The Court: That is the reason that I said what I did, with reference to the part you referred to, on Page 6: that what happened here was an acquisition of a business, that it was a partnership of Schnack, Leffel and Ballentyne, and that was acquired under 740(a)(1)(D), and it had to be not only under 740 (a)(1)(D), and to get that it likewise had to be a 112(b)(5) transaction, and you couldn't have a 112 (b)(5) transaction under 740(a)(1)(D) which took over the going partnership that we have here, namely, the one that you look to for earnings experience, the partnership of Schnack, Leffel and Ballentyne. If you go into that gap that you are talking about, then, you lose yourself. You do not have the same partnership.

Mr. Janin: I think I understand the basis of your decision now, but I certainly didn't before. I am wondering whether it is going to be apparent to the Circuit Court of Appeals, because it seems to me that it is a direct reversal of the Ransehoffs case, and you have now expressed yourself. In other words, you are saying that Ransehoffs was erroneously decided and did not have any change in the ownership of the partnership.

The Court: Not at all. There you did have an [33] intervening partnership. Here the fact of the parties themselves, the transaction they made up, was an acquisition by Hawaiian Freight Forwarders of a three-way partnership. Ownership there was purely transitional. They even inserted provisions in there

about the profits from the business in transit. So they didn't have any intervening partnership like in the Ransehoffs case. You don't have a Ransehoffs case here. You have something else that is different from that. You have Renfro here.

Mr. Janin: I respectfully disagree with your conclusion, but I think I understand your views and that my remedy is clear, that it is on appeal to the Circuit Court, rather than further argument here.

The Court: Well, I regret that what I have said on Page 6, which seems to me to say in much fewer words exactly what I have said here, doesn't convey that to you. The truth is, I prepared an opinion, did it in an elementary way, and took those steps to show that here the parties themselves had no intention of any intervening partnership. It is purely transitional. They were changing from a three-way partnership to the Hawaiian Freight Forwarders and they had to have a little time to work it out. That was all there was to that. It was sort of a spoon-feeding operation, and so elementary, and it turns out to be like it was belabored. I don't see how this could be misunderstood as being that. [34] That, of course, I regret because I always have tried to take pride in the fact that even though I know I go wrong once in awhile on the law, because the Appellate Court tells me so, that they have never had any difficulty knowing what I said in my declaration of law and in my analysis or preliminary statement of facts for the purpose of applying the law. Apparently you had a different view. I am frank to say that I cannot help but feel that part of your

difficulty is that you, from reading your briefs, got yourself completely bogged down in some Hawaiian law that is of no moment for this case, and whether there was an intervening partnership, I think you were treading on very dangerous ground there because you then would be faced with a query as to whether or not, if you did have that intervening partnership there, and you were wrong on your Hawaiian law, you didn't have a Ransehoffs case, you would never get back to this partnership at all. But it seems to me that the facts of this case so completely by-pass that problem that I felt sure that this statement on Page 7 conveyed that message. I am sorry for your sake it didn't.

I trust that the Court of Appeal will understand the basis on which it is decided so that when they do decide the case they will give some beneficial declaration on the law in that light and not on a case that is wholly different from the one that I decided, which would not be helpful to [35] us in settling the law.

Do you have anything further you want to add?

Mr. Janin: I do not think I have anything further.

The Court: Mr. Mather?

Opening Statement on Behalf of the Respondent
By Mr. Mather

Mr. Mather: If Your Honor please, there seems to be very little I can say in the matter, but I would like to mention just a couple of things.

I think there are two motions here. One is for

correction and enlargement of findings of fact. The opinion states:

"The facts have been stipulated and as stipulated are so found."

So I think that disposes of that motion.

The Court: I would so rule because that is a form that has been established and followed and, so far as I know, the Ninth Circuit is completely in accord.

I might say—you both may be familiar with it—back in years past we did have a case or two where the facts were stipulated, a complete stipulation, no evidence other than stipulation of facts.

One of our Judges—I think it was way back in the days when were called the Board of Tax Appeals—proceeded to set up separate findings of fact as his own findings [36] of fact and he didn't want to quote everything in the findings of fact. The case went up on appeal—I do not remember whether it was more than once—but the Circuit sent that case back to us and said, "All of the facts are stipulated. The record shows all the facts were stipulated. You have no basis for making findings of fact because the facts are stipulated, agreed on by the parties, and that is not your function. It is for you to apply the law to those facts."

So we are pretty careful although once in awhile one does slip because of the quantity of cases we handle. But we are careful to heed the admonition of the court on that sort of case.

Mr. Mather: In connection with the other motion, a Motion for Reconsideration, one of the ques-

tions raised is "that said proceeding is decided upon an issue not presented to the Court."

I think the issue was clearly presented to the Court. As I gather from Mr. Janin's remarks, he says that the issue with respect to 112(b(5) wasn't presented to the Court.

I find in Respondent's brief, filed with the Court, the statement:

"The requirement of Section 112(b)(5) has not been met for it cannot be said that the petitioner, by virtue of the exchange on or about March 19, 1940, acquired substantially [37] all the properties of the Hawaiian Freight Forwarders Association."

So clearly, it seems to me, that issue was before the Court.

There is one place in the opinion that I want to point out. I think it goes along with what Your Honor has already said with respect to Page 6, but on Page 7, beginning with the first paragraph, that is about the middle of the page on this mimeographed opinion, it is stated:

"Our question accordingly is whether or not petitioner did acquire within the meaning of Section 740(a)(1)(D) substantially all of the properties of Hawaiian Freight Association, the partnership which was organized on January 2, 1937."

That is the partnership that we are interested in, and not the partnership—if it is a partnership—that existed after the termination of the three-member partnership because if that is so, why, immediately you don't qualify as an acquiring corporation because you have got the intervening partnership.

I do not think there is anything further I can add to this. It seems to me the case was properly decided. In our brief we specifically relied upon the Renfro case, and it seems to me that this is very similar to that case. The Ransehoffs case emanated from this locality and is, it [38] seems to me, clearly distinguished from the Renfro case.

Mr. Janin: I would like to point out one thing that has resulted in this case, as a consequence of the ruling that Section 112(b)(5) was not met. We then have the situation where the excess profits credit is determined upon 8 per cent of the cost basis of capital transferred from the predecessor partnership to the petitioner corporation. I think that that is an inadequate standard. I think, for example, in the general classification of good-will, which included the permit from the Interstate Commerce Commission, there was a very substantial value transferred to the petitioner corporation. I think that, if the ruling is to hold, there should be some opportunity to present evidence on that score.

The Court: Was that in issue?

Mr. Janin: There was no issue raised. That is, I don't find that issue raised as to Section 112(b)(5), not in the opening statement before the Court.

The Court: You cannot escape 112(b)(5). It is a part of 740(a)(1)(D).

Mr. Janin: Section 740(a)(1)(D) refers to Section 112(b)(5). In other words, the business must be taxed for each transfer.

The Court: I think that what I said at the beginning, or the middle of Page 7 is sound, namely:

"Our question accordingly is whether or not petitioner did acquire within the meaning of Section 740(a)(1)(D) substantially all of the properties of Hawaiian Freight Association, the partnership which was organized on January 2, 1937, and which continued to the time when the agreements and understandings were reached under which the withdrawal of Schnack and his interests therein and the acquisition by petitioner of the partnership business and most, if not all, of the remaining assets were effected. If the transaction in question is to meet the requirements of the statute, it is necessary—first, that pursuant to the provisions of Section 740(a)(1)(D) petitioner did acquire substantially all of the properties of that partnership and, second, that the acquisition was in an exchange to which Section 112(b)(5) of the Code was applicable. To be within section 112(b)(5) the exchange must have been solely for stock or securities of petitioner, the acquiring corporation, and after the exchange the persons making the exchange must have been in control of petitioner and not only that but the stock received by each such person must have been substantially in the same proportion as his interest in the property prior to the exchange."

Now, I think you have to face that because Section 112(b)(5) is an inseparable part of the law. That is, you cannot have a question under 740(a)(1)(D) that doesn't [40] include 112(b)(5). I think you obviously have to conclude that Congress had that in mind, that you would have to have your continuity of interest and that the stock had to be sub-

stantially in the same proportion, his interest in the property prior to the exchange. Now, that couldn't be true certainly as to the partnership of Schnack, Leffel and Ballentyne because——

Mr. Janin: Aren't you begging the question when you are talking about——

The Court: Wait until I get through.

That couldn't be true there because, very clearly, Schnack was out and Ballentyne, one of Leffel and Ballentyne, came out with a proportion equal to the other, which he didn't have previously. So even they were out of gear as far as ratios were concerned. And, as the Fifth Circuit pointed out, if you go into the interval, in the transition, then the petitioner there, as to the statute, is on the horns of a dilemma because if he argues that then it does him no good. He gets all earnings history. If he argues the other, then, having handled the transaction in the way it was, and since there wasn't a continuity of interest that 740(a)(1)(D), through the application of 112(b)(5), requires it just doesn't meet what Congress had in mind, because Congress says that it be that. So you have to have that kind of continuity of interest. [41]

Well, I just hope that this is presented in such a way that we will get some further step toward settling the law.

Mr. Janin: That is all we want.

The Court: I do think that this case, as we regard it, is clearly within Renfro. I do not think that the fact that Schnack might have been a silent

partner, if that is what the other record does show, would cure the defect as to the application of the statute as compared with Renfro.

I think the interests of all parties will be speeded if we deny these motions and let you present the matter to the Court of Appeal, and if they think I am wrong, or they do not understand me and they want me to make it clearer—I hope they understand me—why, then, of course, I will be glad to try my hand at it again.

Mr. Janin: Thank you.

The Court: So, on the first motion, with respect to the findings of fact, of course, that will be denied because I do not feel that I could do anything to the findings of fact in light of the fact that they are stipulated. That is what I have found.

On the question of the application of the law, whether we have satisfied any one as to what is the correct application of the law, we do understand now and the reason therefor, and since what we have done here is in keeping [42] with our conclusions as to the law, the motion on that will be denied also.

(Whereupon, at 3:55 o'clock p.m., the hearing in the above-entitled matter was concluded.)

[Endorsed]: Filed November 20, 1950.

PETITIONER'S EXHIBIT No. 3

Territory of Hawaii
Treasury Department, Honolulu

It is hereby certified that the attached is a true and exact copy of: The Statement of Co-Partnership of Hawaiian Freight Association filed and recorded in this office on February 20, 1937.

In witness whereof, I have hereunto set my hand and affixed the seal of the Treasury Department, Territory of Hawaii, this 12th day of April, 1949.

[Seal] /s/ WILLIAM B. BROWN,
Treasurer, Territory of Hawaii.

Act 98, Session Laws, 1917, Section 3410. Statements. Whenever any two or more persons shall carry on business in this Territory in co-partnership, it shall be incumbent on such persons to file, within thirty days after the commencement of such business, and thereafter annually, not later than March 1, in the office of the Treasurer, on blanks to be furnished by the Treasurer, a statement of:

(Statement of co-partnership as follows: Fee for recording, .50 for each name.)

Act 98, Session Laws, 1917, Section 3412. Statements to be published. All such statements as are required to be made in the preceding sections, except those required to be filed annually, shall also be published by the members of each co-partnership at least twice in the English language, in any newspaper of general circulation published in each county and city and county where said co-partnership has a place for the transaction of business.

Petitioner's Exhibit No. 3—(Continued)

Revised Laws of Hawaii, 1915, Section 3415. Penalty for noncompliance. The members of every co-partnership who shall neglect or fail to comply with the provisions of this chapter, shall severally and individually be liable for all the debts and liabilities of such co-partnership and may be severally sued therefor, without the necessity of joining the other members of the co-partnership, in any action or suit, and shall also severally be liable upon conviction to a penalty not exceeding five dollars for each and every day while such default shall continue.

STATEMENT OF CO-PARTNERSHIP

Of Hawaiian Freight Association, City and County of Honolulu, T. H., January 2, 1937.

To the Treasurer of the Territory of Hawaii,
Honolulu, T. H.

Sir:

This Is To Certify that on the Second day of January, 1937, the undersigned entered into and formed a general partnership, and herewith submit for filing in your office in compliance with law, the following statement:

1. The names and residences of each of the members of said co-partnership are:

J. C. Leffel, Chicago, Illinois.

G. C. Ballentyne, Honolulu, T. H.

A. G. Schnack, Honolulu, T. H.

2. The nature of the business of said co-partnership is to maintain and carry on a Freight Forwarding Business.

3. The firm name of said co-partnership is Hawaiian Freight Association.

Petitioner's Exhibit No. 3—(Continued)

4. The place of business of said co-partnership is at Honolulu, T. H., 238 Dillingham Bldg., in the District of Honolulu, City and County of Honolulu, Territory of Hawaii.

Witness our hands, this 16th day of Feb., A.D. 1937.

/s/ J. C. LEFFEL,

/s/ G. C. BALLENTYNE,

/s/ A. G. SCHNACK,

Territory of Hawaii—ss.

On this 16 day of Feb., 1937, before me personally appeared G. C. Ballentyne and A. G. Schnack, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[Seal] /s/ J. SCHNACK,

Notary Public, First Judicial Circuit, Territory of Hawaii.

February 1st, 1937

I Nathan Hillman, Notary Public for the State of Illinois, County of Cook, do hereby state that J. C. Leffel before me personally appeared on the 1st day of February 1937, and executed the foregoing instrument attached hereto, and acknowledged that he executed the same, as his own free act and deed.

[Seal] /s/ NATHAN HILLMAN,

Notary Public.

[Stamp]: Paid Feb. 20, 1937, Treasurer's Office, Territory of Hawaii.

T.C.U.S. Admitted in Evidence May 13, 1949.

PETITIONER'S EXHIBIT No. 4

Territory of Hawaii
Treasury Department, Honolulu

It is hereby certified that the attached is a true and exact copy of: The Statement of Dissolution of the Co-Partnership of Hawaiian Freight Association filed and recorded in this office on July 2, 1940.

In witness whereof, I have hereunto set my hand and affixed the seal of the Treasury Department, Territory of Hawaii, this 12th day of April, 1949.

[Seal] /s/ WILLIAM B. BROWN,
Treasurer, Territory of Hawaii.

Section 6862, Revised Laws of 1935. Statements of changes or dissolution. Whenever any change shall take place in the constitution of any such firm by the death or withdrawal of any member thereof, or by the addition of any member thereto, or by the dissolution thereof, a statement of such change or dissolution shall also be filed in the said office of the treasurer, on blanks to be furnished by the treasurer, within thirty days from such change, death or dissolution, and acknowledged before a notary public in the manner provided by law for the acknowledgment of deeds, as the case may be.

(Statement of dissolution as follows: Recording fee, .50 for each name.)

Section 6863. Revised Laws of 1935. Statements to be published. All such statements as are required to be made in the preceding sections, except those required to be filed annually, shall also be published

Petitioner's Exhibit No. 4—(Continued)

by the members of each co-partnership at least twice in the English language, in any newspaper of general circulation published in each county and city and county where said co-partnership has a place for the transaction of business.

Section 6866. Revised Laws of 1935. Penalty for non-compliance. The members of every co-partnership who shall neglect or fail to comply with the provisions of this chapter, shall severally and individually be liable for all the debts and liabilities of such co-partnership and may be severally sued therefor, without the necessity of joining the other members of the co-partnership, in any action or suit, and shall also severally be liable upon conviction to a penalty not exceeding five dollars for each and every day while such default shall continue.

STATEMENT OF DISSOLUTION OF THE CO-PARTNERSHIP

Of Hawaiian Freight Association, City and County of Honolulu, T. H., June 26th, 1940.

To the Treasurer of the Territory of Hawaii,
Honolulu, T. H.

Sir:

This Is To Certify, That on the 14th day of March, 1940, the Co-partnership firm of Hawaiian Freight Association, maintaining and carrying on a freight forwarding business at Dillingham building, in the district of Honolulu, City and County of Honolulu,

Petitioner's Exhibit No. 4—(Continued)

Territory of Hawaii, was dissolved by mutual consent, and in compliance with law, the following statement is herewith filed.

That the Partners of the said Co-partnership firm at the date of dissolution were:

J. C. Leffel, residing at Chicago, Illinois.

G. C. Ballentyne, residing at 2512 Ferdinand St.
A. G. Schnack, residing at Dowsett Tract.

Witness our hands this 26th day of June, A.D. 1940.

/s/ A. G. SCHNACK,
/s/ G. C. BALLENTYNE

Territory of Hawaii,
Honolulu, Oahu—ss.

On this 26th day of June, 1940, before me personally appeared A. G. Schnack and G. C. Ballentyne, both of Honolulu, Territory of Hawaii, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[Seal] /s/ JOHN EFFINGER,
Notary Public, First Judicial Circuit, Territory of Hawaii.

[Stamp]: Paid Jul 2 1940 Treasurer's Office, Territory of Hawaii.

T.C.U.S. Admitted in Evidence May 13, 1949.

PETITIONER'S EXHIBIT No. 5

Territory of Hawaii
Treasury Department, Honolulu

I, H. H. Adams, First Deputy Treasurer of the Territory of Hawaii, do hereby certify that according to the records of the Territorial Treasurer's Office, Hawaiian Freight Association was a general co-partnership organized on January 2, 1937 by J. C. Leffel, G. C. Ballentyne and A. G. Schnack, and was registered in the Treasurer's Office on February 20, 1937; that a statement of dissolution of the co-partnership on March 14, 1940 was registered in the Treasurer's Office on July 2, 1940; that no other statement of change in the co-partnership was registered; and that no statement of a new co-partnership between J. C. Leffel and G. C. Ballentyne under the style name Hawaiian Freight Association was registered in the Treasurer's Office between January 1, 1940 and April 30, 1940.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Treasurer's Office, at Honolulu, Territory of Hawaii, this 26th day of April, A. D. 1949.

[Seal] /s/ H. H. ADAMS,
First Deputy Treasurer,
Territory of Hawaii.

T.C.U.S. Admitted in Evidence May 13, 1949.

PETITIONER'S EXHIBIT No. 7

Calendar year 1941, fiscal years ended in 1942.

(Taxpayer's Name) Hawaiian Freight Forwarders, Limited

Fiscal Year Ended November 30, 1941

SCHEDULE No. 2-B
EXCESS PROFITS CREDIT BASED ON INCOME

Base Period Net Income—Gen. Average		Additions	
Excess profits net income:	Per Return	(Deductions)	Corrected
Year ended 3-31-37	$ 3,829.92	$ 5,285.15	$ 9,115.07
Year ended 3-31-38	28,898.06	(3,058.54)	25,839.52
Year ended 3-31-39	16,327.84	(1,112.19)	15,215.65
Year ended 3-31-40	11,996.17	14,887.63	26,883.80
Totals	$61,051.99	$16,002.05	$77,054.04
Net aggregate	$61,051.99	$16,002.05	$77,054.04
Average base period net income	$15,262.99	....	$19,238.51
Base Period Net Income—			
Increased Earnings in Last Half			
Net aggregate, last half of period	....	....	$42,099.45
Net aggregate, first half of period	....	....	34,954.59
Excess, last half over first half	....	....	$ 7,144.86
50% of such excess	....	....	$ 3,572.43
Add: Net aggregate for last half	....	....	42,099.45
Totals	....	....	$45,671.88
Average base period net income:			
Based on above totals	....	....	$22,835.94
Limited to e.p. net income for			
Excess Profits Credit			
95% of avge. base period net income			
Add: 8% of net capital addition	....	....	$21,694.14
Less: 6% of net capital reduction			
Excess profits credit	....	....	$21,694.14

parenthesis preceding the text on the adjusted lines.)

T.C.U.S. Admitted in Evidence May 13, 1949.

PETITIONER'S EXHIBIT No. 8

Name: Hawaiian Freight Forwarders, Ltd.

Schedule 6 Year ended 11-30-42

EXCESS PROFITS CREDIT—BASED ON INCOME COMPUTATION—INCREASED INCOME METHOD

1.	Excess profits net income, year 1939	$15,215.65	
2.	Excess profits net income, year 1940	26,883.80	
3.	*Excess profits net income year	....	
4.	Aggregate—last half of base period		$42,099.45
5.	Excess profits net income, year 1937	9,115.07	
6.	Excess profits net income, year 1938	25,839.52	
7.	Excess profits net income, year	....	
8.	Aggregate—first half of base period		34,954.59
9.	Excess of aggregate of last half over aggregate of first half		7,144.86
10.	One-half of excess		3,572.43
11.	Aggregate of last half		42,099.45
12.	Total of lines 10 and 11		43,671.88
13.	Line 12 divided by number of months in second half, multiplied by twelve		22,835.94
14.	Highest excess profits net income for any taxable year—base period		26,883.80
15.	Average base period income, line 13 or 14, whichever is lesser		22,835.94

COMPUTATION—EXCESS PROFITS CREDIT

16.	95 percent of line 15 or of amount computed under general average method, whichever is greater		$21,694.14
17.	Net capital addition or net capital reduction....$	....	
18.	8 percent of line 17, if a net capital addition (or 6 percent if a net capital reduction)		....
19.	Excess profits credit—based on income—(line 16 plus (or minus) line 18)		$21,694.14

* If taxable year ended after May 31, 1940, insert amount computed under section 713(f)(7).

T.C.U.S. Admitted in Evidence May 13, 1949.

RESPONDENT'S EXHIBIT E

Schedule J.—PARTNERS' SHARES OF INCOME AND CREDITS. (See Instruction 28)

1. Name and address of each partner. If the full time of any partner was not devoted to the business, the percentage of time devoted must be stated	2. Ordinary net income less interest on Government obligations, etc. (item 25, page 1, minus item 7, page 1, and dividends included in item 12, page 1)	3. Net short-term gain (or loss) from sale or exchange of capital assets (from Schedule H, Summary, line 1, column 4)	4. Net long-term gain (or loss) from sale or exchange of capital assets (from Schedule H, Summary, line 2, column 4)
. C. Leffel, Chicago, Illinois	$ 12,477.64	$	$ (2.20)
, C. Ballentyne Honolulu, T.H.	12,477.64		(2.20)
. G. Schnack	2,703.26		—
Totals	$ 27,658.54	$	$ (4.40)

CONTINUATION OF SCHEDULE J

6. Wholly tax-exempt obligations (items (a), (b), (c), and (d) of Schedule A)		Partially tax-exempt: 7. United States Savings Bonds and Treasury Bonds (line (e), Schedule A)		Partially tax-exempt: 8. Obligations of certain instrumentalities of the United States (line (f), Schedule A)		9. Earned income	10. Charitable contributions (from Schedule D)	11. Federal income tax paid at source (2 percent of item 6, page 1)	12. Income and profits taxes paid to a foreign country or United States possession
Principal	Interest	Principal	Interest	Principal	Interest				
$	$	$	$	$	$	$	$	$	$
$	$	$	$	$	$	$	$	$	$

QUESTIONS

…e of organization January 1, 1937
…re of organization (partnership, syndicate, pool, joint venture, …c.) Partnership
… a return filed for preceding year? Yes If so, to which …llector's office was it sent? Honolulu
…ck whether this return was prepared on the cash ☒ or accrual ☐ basis.
…e whether inventories at the beginning and end of the taxable …ar were valued at (a) cost, or (b) cost or market, whichever is …wer

If any other basis is used, attach statement describing basis fully, state why used and the date inventory was last reconciled with stock

6. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company, as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No") No
   If answer is "Yes," attach schedule required by Instruction I.
7. Was return of information on Forms 1096 and 1099 filed for the calendar year 1940? (See Instruction H) Yes

AFFIDAVIT (See Instruction D)

…wear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of …wledge and belief is a true, correct, and complete return, made in good faith, for the accounting period stated, pursuant to the Internal …e Code and the regulations issued under authority thereof.

…bscribed and sworn to before me this 2nd day of March, 1941.

Ruth G. Hall
(Signature and title of officer administering oath)

G. C. Ballentyne
(Partner or member)

(Address of partner or member)

(If this return was prepared for you by some other person, the following affidavit must be executed)

AFFIDAVIT (See Instruction D)

…we swear (or affirm) that I/we prepared this return for the organization named herein and that the return (including any accompanying …les and statements) is a true, correct, and complete statement of all the information respecting the income of the person for whom this …has been prepared of which I/we have any knowledge.

…bscribed and sworn to before me this

18th day of March, 1941.

Ruth G. Hall
(Signature and title of officer administering oath)

(Signature of person preparing the return)

… CPA
(Name of firm or employer, if any)

U. S. GOVERNMENT PRINTING OFFICE 16—17571

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of The United States, do hereby certify that the foregoing documents, 1 to 54, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review" in the proceeding before The Tax Court of The United States in the above entitled proceeding and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of The United States, at Washington, in the District of Columbia, this 1st day of June, 1951.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States.

[Endorsed]: No. 12965. United States Court of Appeals for the Ninth Circuit. Hawaiian Freight Forwarders, Ltd., Petitioner, vs. Commissoner of Internal Revenue, Respondent. Transcript of Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: June 9, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 12965

HAWAIIAN FREIGHT FORWARDERS, LTD.,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STIPULATION RE EXCESS PROFITS TAX RETURNS FILED BY PETITIONER

It Is Hereby Stipulated by and between the parties that the petitioner on review may file an Amended Designation of Contents of Record to be Printed in substantially the form of the Amended Designation attached hereto. This stipulation is made in order to simplify the printed record by eliminating therefrom all immaterial portions of the record and all portions the materiality of which can be covered

in substance by the following two facts which the parties hereby stipulate to be true:

1. All excess profits tax returns filed by petitioner on review for the taxable years ending November 30, 1940, November 30, 1941, November 30, 1942, November 30, 1943, November 30, 1944, and November 30, 1945, computed petitioner's excess profits credit by reference to the earnings experience of Hawaiian Freight Association.

2. Both the original and the amended partnership return of income for 1940 (Respondent's Exhibits D and E, respectively) covered in a single return, the period from January 1, 1940 to March 31, 1940, and listed J. C. Leffel, G. C. Ballentyne and A. G. Schnack as partners.

It is the purpose and intention of the parties that the portions of the record which the attached amended designation would eliminate from the printed record be available for this Court's examination, if this Court considers them material to any facts in addition to those covered in this stipulation.

Dated July 2, 1951.

/s/ LOUIS JANIN,

/s/ HAROLD E. HAVEN,

Counsel for Petitioner on Review.

/s/ THERON LAMAR CAUDLE,

Assistant Attorney General,

Counsel for Respondent on Review.

AMENDED DESIGNATION OF CONTENTS OF RECORD TO BE PRINTED AND ADOPTION OF ASSIGNMENTS OF ERROR AS STATEMENT OF POINTS

Now comes the petitioner on review, by and through its counsel, Louis Janin and Harold E. Haven, and designates the following as the record to be included in the printed transcript, to wit:

The entire typewritten record as transmitted from the Tax Court of the United States, except for the following:

(a) Petitioner's Exhibit 6, which is page 14 of said record.

(b) Petitioner's Exhibit 7, which is page 15 of said record, except for page 11 of said Exhibit 7, which page petitioner designates to be printed.

(c) Petitioner's Exhibit 8, which is page 16 of said record, except for page 12 of said Exhibit 8, which page petitioner designates to be printed.

(d) Respondent's Exhibits C through Q, both inclusive, (which are pages 17 through 31, both inclusive, of said record) except for the last page of Respondent's E, which page petitioner designates to be printed.

(e) All briefs filed in said Tax Court of the United States, which briefs are pages 32, 33 and 34 of said record.

(f) Motion for correction and enlargement of findings of fact, which is page 37 of said record.

(g) Motion for reconsideration, which is page 38 of said record.

(h) Motion for hearing, which is page 39 of said record.

(i) Computation for entry of decision, which is page 40 of said record.

(j) Notice under Rule 50, which is page 41 of said record.

(k) Motion to defer action on Rule 50 computation, which is page 42 of said record.

(l) Order, which is page 47 of said record.

(m) Notice, which is page 48 of said record.

(n) Untitled agreement with Rule 50 computation, which is page 49 of said record.

Petitioner on review by and through said counsel hereby adopts as the points upon which it intends to rely in support of its petition for review, the assignments of error contained in the petition for review.

Dated: July 2, 1951.

/s/ LOUIS JANIN,
/s/ HAROLD E. HAVEN,
Counsel for Petitioner on Review.

[Endorsed]: Filed July 20, 1951. Paul P. O'Brien, Clerk.